



# General Assembly

Distr.: General  
13 August 2001

Original: English

## United Nations Commission on International Trade Law

Thirty-fifth session  
New York, 10-28 June 2002

### Report of the Working Group on Insolvency Law on the work of its twenty-fourth session (New York, 23 July-3 August 2001)

#### Contents

|                                                                          | <i>Paragraphs</i> | <i>Page</i> |
|--------------------------------------------------------------------------|-------------------|-------------|
| I. Introduction.....                                                     | 1-16              | 2           |
| II. Deliberations and decisions .....                                    | 17-18             | 5           |
| III. Consideration of draft legislative guide on insolvency law .....    | 19-155            | 5           |
| A. General remarks .....                                                 | 19                | 5           |
| B. Key objectives of an effective and efficient insolvency regime .....  | 20                | 5           |
| C. Core provisions of an effective and efficient insolvency regime ..... | 21-155            | 6           |
| 1. Relationship between liquidation and reorganization proceedings ..... | 21-22             | 6           |
| 2. Initiation and commencement of insolvency proceedings.....            | 23-44             | 7           |
| 3. Consequences of commencement of insolvency proceedings .....          | 45-89             | 11          |
| 4. Administration of proceedings .....                                   | 90-143            | 21          |
| 5. Liquidation and distribution .....                                    | 144-155           | 32          |
| IV. Alternative informal insolvency processes .....                      | 156-161           | 34          |

## I. Introduction

1. At its thirty-third session, the Commission noted the recommendation made by the Working Group on Insolvency Law in the report of the exploratory session held at Vienna from 6 to 17 December 1999 (A/CN.9/469, para. 140) and gave the Group the mandate to prepare a comprehensive statement of key objectives and core features for a strong insolvency, debtor-creditor regime, including consideration of out-of-court restructuring, and a legislative guide containing flexible approaches to the implementation of such objectives and features, including a discussion of the alternative approaches possible and the perceived benefits and detriments of such approaches.

2. At that session, the Commission also recommended that in carrying out its task the Working Group should be mindful of the work under way or already completed by other organizations, including the World Bank, the International Monetary Fund (IMF), the Asian Development Bank (ADB), INSOL International (INSOL) (an international federation of insolvency professionals) and Committee J of the Section on Business Law of the International Bar Association (IBA). In order to obtain the views and benefit from the expertise of those organizations, it was noted that the Secretariat would organize a colloquium before the next session of the Working Group, in cooperation with INSOL and the IBA, as had been offered by those organizations.<sup>1</sup>

3. That colloquium was organized with the co-sponsorship and organizational assistance of INSOL and in conjunction with the IBA at Vienna, 4-6 December 2000, with a view to identifying and discussing the needs of nations in the process of undertaking reform of their domestic laws relating to insolvency and to determine the manner in which the Commission and other organizations could assist that process of reform.

4. Broad support was expressed by participants in the Colloquium in favour of the Commission undertaking work on the key elements of an effective insolvency regime (see Report on UNCITRAL/INSOL/IBA Global Insolvency Colloquium, document A/CN.9/495, para. 34). The Colloquium strongly recommended that approximately 6 months be allowed for thorough preparation of drafts for consideration by the Working Group. It was also noted that the Commission had requested the Working Group to bear in mind the work underway or already completed by other international organizations and to commence its work after receipt of the reports currently being prepared by other organizations, including the World Bank.

5. At its thirty-fourth session (Vienna, 25 June-13 July 2001), the Commission took note with satisfaction of the report of the Colloquium (A/CN.9/495) and commended the work accomplished so far, particularly the holding of the Colloquium and the efforts of coordination with the work carried out by other international organizations in the area of insolvency law. The Commission discussed the recommendations of the Colloquium, particularly with respect to the form that future work might take and the interpretation of the mandate given to the Working Group by the Commission at its thirty-third session.

---

<sup>1</sup> *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 17, A/55/17, para. 408.*

6. In terms of the mandate given to the Working Group, the Commission was generally of the view that it should be interpreted broadly to enable the Working Group to develop a work product that could reflect the elements mentioned in the mandate for inclusion (see para. 1 above and document A/CN.9/495, para. 13). As to the possible form of future work, it was reaffirmed that a model law on substantive features of an insolvency regime would be neither desirable nor feasible, given the complexity and variety of issues involved in insolvency law and the disparity of approaches taken within the various legal systems. The view was widely shared that the work should ensure as much flexibility as possible, while at the same time maximizing utility. A concern was that while a legislative guide could provide the necessary flexibility, it might result in a product that was too general and too abstract to provide the required guidance. Accordingly, it was suggested that the Working Group bear in mind the need to be as specific as possible in developing its work and in that connection it was suggested that model legislative provisions, even if only addressing some of the issues to be included in the guide, should be included as far as possible.

7. The view was widely shared that the work should take the form of a legislative guide. It was pointed out that a product issued in that form might prove very useful not only for countries that did not have efficient and effective insolvency regimes and needed to develop such a regime, but also for countries which had undertaken or were to undertake the process of modernizing and reviewing their national systems. A further view was that in developing the guide the Working Group should be mindful of the goal of furthering trade and promoting commerce, not just of the goal of harmonization of existing laws.

8. It was suggested that the three key areas for organizing the material to be included in the guide, as outlined in paragraphs 30-33 of document A/CN.9/495, provided an appropriate format for the essential elements and that work should proceed on that basis. As to the substantive contents of the guide, a number of suggestions were made, including that, in developing the legislative guide, the Working Group should bear in mind a number of key principles and objectives such as: respecting issues of public policy; enhancing the coordination role of courts; establishing a special regime for public claims; the priority of reorganization over liquidation; preserving the operation of the business and employment; guaranteeing salaries; the role of courts in controlling the insolvency representatives; equal treatment of creditors; transparency of collective proceedings. It was observed that those principles should not be interpreted as limiting the mandate given to the Working Group, but might usefully be taken into account by the Working Group for the purposes of guidance and to avoid the legislative guide being overly general. It was suggested that either banks and financial institutions should remain outside the scope of the work or that a special regime should be maintained for those entities.

9. Other suggestions which received some support included the need to take account of a number of issues that had proven to be problems in international insolvency, such as the difficulty of collecting and disseminating information on companies that were the subject of insolvency proceedings, providing access for foreign creditors to make claims, equal treatment of foreign creditors and the treatment of late claims, especially where they may be made by foreign creditors. It was further noted that insufficient care in decisions to grant credit proved, though apparently remote, to be one of the causes of insolvency. It was recalled that the UNCITRAL Model Law on Cross-Border Insolvency already addressed a number of those problems. It was noted that while some of those issues might also be relevant in the context of the current project to develop a legislative

guide, there was no intention that the current project should change or amend the Model Law in any way.

10. After discussion, the Commission confirmed that the mandate given to the Working Group at the thirty-third session of the Commission should be widely interpreted to ensure an appropriately flexible work product, which should take the form of a legislative guide.

11. The Working Group on Insolvency Law, which was composed of all States members of the Commission, held its twenty-fourth session at New York from 23 July to 3 August 2001. The session was attended by representatives of the following States members of the Working Group: Austria, Brazil, Cameroon, Canada, Colombia, Fiji, France, Germany, Honduras, India, Iran (Islamic Republic of), Italy, Japan, Lithuania, Russian Federation, Singapore, Spain, Sudan, Sweden, Thailand, Uganda, United Kingdom of Great Britain and Northern Ireland and United States of America.

12. The session was attended by observers from the following States: Algeria, Australia, Bangladesh, Belarus, Brunei Darussalam, Bulgaria, Denmark, Ecuador, Lao People's Democratic Republic, Guinea, New Zealand, Nigeria, Peru, Philippines, Portugal, Republic of Korea, Saudi Arabia, Slovakia, Switzerland, Turkey, United Arab Emirates, Venezuela and Yugoslavia.

13. The session was also attended by observers from the following international organizations: American Bar Association, Asian Development Bank, European Bank for Reconstruction and Development (EBRD), European Central Bank, Groupe de Reflexion sur l'insolvabilité et sa prévention (G.R.I.P.), Insol International, International Bar Association, Inter Pacific Bar Association, International Insolvency Institute, International Monetary Fund, International Working Group on European Insolvency Law, The Group of Thirty, World Association of Former United Nations Interns and Fellows and the World Bank.

14. The Working Group elected the following officers:

*Chairman:* Mr. Wisit WISITSORA-AT (Thailand);

*Vice-Chairman:* Mr. Paul HEATH (New Zealand), elected in his personal capacity;

*Rapporteur:* Mr. Jorge PINZON SANCHEZ (Colombia).

15. The Working Group had before it the following documents: the provisional agenda (A/CN.9/WG.V/WP.53), two Reports of the Secretary-General: "First draft of a legislative guide on insolvency law" (A/CN.9/WG.V/WP.54, A/CN.9/WG.V/WP.54/Add.1 and A/CN.9/WG.V/WP.54/Add.2) and "Alternative approaches to out-of-court insolvency processes" (A/CN.9/WG.V/WP.55).

16. The Working Group adopted the following agenda:

1. Election of officers.
2. Adoption of the agenda.
3. Preparation of a legislative guide on insolvency law.

4. Other business.
5. Adoption of the report.

## **II. Deliberations and decisions**

17. At the present session, the Working Group on Insolvency Law commenced its work on the preparation of a legislative guide on insolvency law, pursuant to the decisions taken by the Commission at its thirty-third (New York, 12 June-7 July 2000)<sup>2</sup> and thirty-fourth sessions (Vienna, 25 June-13 July 2001).<sup>3</sup> The decisions and deliberations of the Working Group with respect to that legislative guide are reflected in section III below.

18. The Secretariat was requested to prepare a revised version of the guide, based on those deliberations and decisions, to be presented to the twenty-fifth session of the Working Group on Insolvency Law (Vienna, 3-14 December 2001) for review and further discussion.

## **III. Consideration of draft legislative guide on insolvency law**

### **A. General Remarks**

19. At the outset of the current session, some international organizations presented the status of their work in the field of insolvency law. The Working Group heard that the World Bank report "Principles and Guidelines for Effective Insolvency and Creditor Rights Systems" had been published in April 2001. In that connection, it was observed that a crucial goal of the report was to foster and enhance the availability of credit by increasing certainty and predictability of creditors' rights, so that they can accurately assess the risks and consequences of the loans they make. While counterbalancing policies might be appropriate in some cases, it was suggested that they should not intrude into the insolvency regime unless a balance could be achieved with the goals of certainty and predictability. It was noted that national surveys aimed at refining the Principles in respect of the specific needs of different jurisdictions would be carried out as a way of implementing the report. The need for devices capable of increasing the availability and reducing the cost of credit was recognized by various international organizations active in the field of insolvency law.

### **B. Key objectives of an effective and efficient insolvency regime**

20. The Working Group commenced its consideration of the draft legislative guide set forth in documents A/CN.9/WG.V/WP.54 and addenda 1 and 2 by considering the statement of key objectives set forth in Part One, paragraphs 16-22. The view was expressed that Part One reflected the key objectives necessary for effective and efficient

<sup>2</sup> *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 17, A/55/17*, paras. 186-192.

<sup>3</sup> *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 18, A/55/18*, paras. \_\_\_\_ (to be finalized yet).

insolvency regimes and that few additions were required. It was suggested that the need to have an insolvency system anchored within both the legal and commercial regimes of a country should be clearly stated within the key objectives, with the reference to commercial systems intended to include not only commercial law but also commercial practices and usages which were recognized as part of a country's regulatory regime. It was also suggested that the key objectives should be developed in parallel with the discussions in the Working Group on the substance of the draft Guide. In particular, it was pointed out that the words in square brackets in paragraph 19, referring to sanctions for failure to commence insolvency proceedings at an early stage, raised issues of substance that would need to be considered in the context of initiation and commencement in Part Two of the draft Guide. Because of the importance to an effective and efficient insolvency regime of provisions addressing cross-border issues, it was suggested that the relationship between the draft Guide and the Model Law on Cross-Border Insolvency should be borne in mind in the discussions, with a view to determining at a later stage whether the Model Law should form part of the final work product.

### **C. Core provisions of an effective and efficient insolvency regime**

#### **1. Relationship between liquidation and reorganization proceedings**

21. The general view was that the draft Guide should point out, in a complementary manner, the advantages and disadvantages of the different types of proceedings available in order to ensure flexibility and that the choice of proceedings in any given case was focused upon the most efficient solution. It was agreed that both liquidation and reorganization proceedings should be included as options and that the draft Guide should reflect both unitary proceedings (where the decision as to whether liquidation or reorganization was the most appropriate process was made at some time after the application for commencement when there had been an opportunity to assess what was most appropriate for the enterprise in question) and dual proceedings (where the party commencing the proceedings was given the choice of liquidation or reorganization).

22. While noting that maximization of value was a key objective, it was pointed out that there were cases that should be mentioned in the draft Guide where that objective should be balanced against more important social interests that might suggest the adoption of a different approach. It was suggested that the draft Guide should point out the implications of the choice of unitary or dual processes in terms of other components of the insolvency regime, rather than recommending the adoption of one or the other approach. For example, where dual proceedings were adopted, the insolvency regime should provide for conversion between them and the draft Guide should indicate the circumstances in which that conversion would be most likely to be relevant, such as in reorganization proceedings commenced by the debtor or by the creditors and liquidation proceedings commenced by the creditors. While it was suggested that it might also be appropriate for the draft Guide to consider which party could seek conversion, whether based upon an approach that reflected the interests of creditors or balanced the interests of all stakeholders, some concern was expressed that that involved matters that should be left to national law. Where a unitary proceeding was preferred, it was suggested there would need to be a period of assessment protected by a stay, in order to allow the entity to stabilize its situation and determine the most efficient ways of addressing its financial difficulties.

## 2. Initiation and commencement of insolvency proceedings

### (a) *Scope*

23. One concern expressed related to the reference in paragraph 24 to presence of assets as a basis for commencement of insolvency proceedings. It was suggested that while that connection might be a sufficient basis for the commencement of liquidation proceedings, it was too tenuous for the commencement of reorganization proceedings. A further concern related to the inclusion within the insolvency regime of state-owned enterprises, whether acting in a commercial capacity or not.

### (b) *Initiation of insolvency proceedings*

24. The Working Group discussed the need to achieve a balance between incentives for early initiation of proceedings and sanctions to compel early initiation. The view was expressed that the imposition of sanctions, such as those aimed at the liability of directors for trading whilst insolvent, had proven to be successful in a number of countries and had led to increased applications for reorganization. In other countries, however, while the sanctions were available, they were not consistently applied and were therefore ineffective as a means of compelling the initiation of proceedings. It was suggested that the imposition of such sanctions needed to be carefully considered to avoid situations where directors might take defensive decisions to avoid liability or, in the context of out-of-court processes, where directors might need to have immunity from liability in order to achieve a successful result. It was pointed out that the issue of liability was closely related to the extent to which management retained control and had an exclusive period to prepare a reorganization plan.

25. As a general recommendation, it was suggested that the draft Guide should consider each of the topic areas not only in terms of the key objectives set forth in Part One, but also in terms of the impact of each upon other topics and policies.

26. Different views were expressed with respect to initiation of proceedings and the party that should be able to apply. There was general agreement that debtors should have available to them both liquidation and reorganization procedures. As to initiation by creditors, although different views were expressed as to the relevant criteria, there was general agreement that creditors should be permitted to initiate both liquidation and reorganization proceedings.

27. In the case of initiation by creditors, support was expressed in favour of an application being made by one or more creditors, without specifying a particular number, while there was also support for the number to be specified. A concern was expressed that allowing an application by a single creditor might lead to the insolvency procedure being used as an alternative to ordinary debt enforcement procedures, since the debt might more appropriately be pursued elsewhere. Another view was that a criterion addressing the value of outstanding debts could be relevant so that a single creditor could apply in circumstances where the value of that creditor's debt was significant or a number of creditors could apply where the composite of their debt exceeded a certain specified amount. It was also suggested that the application criteria should specifically refer to unsecured creditors who had undisputed debts. On the question of the criteria for initiation of proceedings, one view was that the same criteria should apply to initiation by both the debtor and by creditors. Another view was that different tests should apply. In the case of a debtor, the application could be made on the basis of a general cessation of payments or the likelihood that the debtor would become

A/CN.9/504

unable to pay its debts in the future as and when they fell due. It was suggested that that test might be reflected in the draft Guide along the lines of the debtor having "no reasonable prospect of being able to pay its debts."

28. In the case of creditor initiation, a view was expressed that, as noted in paragraph 51b. of document A/CN.9/WG.V/WP.54, creditors should be able to show that they held mature claims that had not been paid by the debtor. A preliminary issue raised was the need to clearly define the meaning of the term "maturity" to avoid disputes. A question was raised as to whether the debts really needed to be mature and due and whether the adoption of such a test might not limit access to insolvency proceedings unnecessarily and impact broadly upon the cost and availability of credit. That was stated to be particularly the case in situations where even though the debt was not mature, it was clear that the debtor's situation would result in it not being able to pay when the debt became mature. It was pointed out, however, that providing no restriction on access could result in insolvency proceedings being used as an alternative to debt enforcement mechanisms. A related question was whether the mature debts needed to be held by applying creditors, or whether it might be possible for other creditors holding immature debts to apply on the basis that the debtor had mature, outstanding debts. It was suggested that where the criterion of maturity was included, there might need to be an exception to cover situations such as where the debtor was acting fraudulently, where there was evidence of preferential treatment of some creditors, or where proceedings were being commenced to implement a pre-negotiated reorganization.

29. On the question of whether the entry criteria for creditor applications should be the same for both liquidation and reorganization different views were expressed. One view was that to achieve the goal of timely, efficient and impartial access to insolvency proceedings, one of the key objectives noted in Part One of the draft Guide, the criteria should be the same and should be broadly formulated. To reflect that suggestion and the need to accommodate both unitary and dual processes, it was proposed that an approach along the following lines should be considered:

"An application to open or commence insolvency proceedings may be made by:

a. A debtor, in which case the debtor should show actual or prospective inability to pay debts or that the liabilities exceed the value of the assets of the debtor.

b. One or more creditors that are owed a matured debt, in which case the creditor(s) should show that the debt has matured and is unpaid."

30. It was noted that that proposal was intended to establish minimum agreed entry criteria, and that the draft Guide could note and discuss potential variations, such as a requirement for a minimum amount of debt or that the debt need not be mature. While there was agreement for taking that general approach, some support was expressed in favour of the test being that the debtor "is unable or will be unable to pay its debts as and when they fall due."

31. A view was also expressed that entry criteria for creditor applications for reorganization should be more restrictive than for liquidation applications, with criteria such as a requirement for the creditors to be able to show that the business could continue to trade and could be successfully reorganized, being added. If those criteria were to be included, the view was expressed that clear guidance would need to be

provided as to what was required to be demonstrated, such as the availability of ongoing cash to pay debts for day to day running of the business, that the value of assets would support reorganization, and that the return to creditors would be greater than in liquidation. Concern was expressed that additional criteria could operate as a barrier to entry and it was suggested that they could only be considered in terms of the consequences of commencement and how the proceedings continued. It was noted, for example, that in systems where a stay applied automatically on commencement, the ability of the business to continue trading and be successfully reorganized could be assessed after commencement. In other systems, that information might be needed before commencement of reorganization, since the choice of that proceeding presupposed that it would lead to a greater return. It was also observed that the choice of entry criteria for reorganization depended upon the objective of the insolvency regime; if it was maximization of value the requirements would be different to those applicable where the objective was recycling of assets. The need to discuss those policy issues in the draft Guide was reaffirmed.

32. On the issue of the role that courts should play in commencement of proceedings, the view was expressed that while the court did not necessarily need to play a central supervisory role (that could perhaps be played by an administrative agency) parties should always have recourse to the courts to resolve disputes. It was pointed out that too much involvement of the court as the supervisory body might lead to delay and might render reorganization proceedings cost ineffective, particularly in the case of small and medium enterprises. It was also suggested that in some countries, such as those where the judiciary was very small, it was neither efficient nor effective to expect the courts to play a central role. Another view was that the role of the courts was central to supervision of the insolvency process and that that function could not be given to another body, however constituted.

33. The Working Group considered the proposal contained in paragraph 51c. of document A/CN.9/WG.V/WP.54/Add.1, concerning applications for insolvency proceedings made by governmental authorities. Wide support was expressed in favour of possible initiation of insolvency proceedings by such an authority. However, a shared concern was that vesting such an authority with a general power to initiate insolvency proceedings might create uncertainty and therefore be inappropriate.

34. The suggestion that the explanatory section of the draft Guide be expanded to mention specific violations of laws other than criminal laws (e.g. administrative or environmental laws) as factors possibly triggering initiation by the governmental authority was not supported. Furthermore, it was also noted that excessive expansion of situations enabling the public authority to file an application would exceed the scope of insolvency law.

35. Accordingly, the Working Group agreed that some criteria providing guidance as to the situations triggering that power and the manner in which it should be exercised, with a view to restricting the discretion of the relevant authority, should be provided.

36. Another suggestion was that the power of the governmental authority to initiate should apply not only to liquidation but also to reorganization proceeding, with a view to ensuring that the public interest be preserved in those situations when reorganization was possible but the debtor and the creditors failed to apply.

37. The Working Group considered a number of issues relevant to commencement of the insolvency proceedings. On the question of the need to ensure a speedy consideration of the application to commence proceedings, the general view was that that decision should be made promptly to avoid dilution of value and ensure certainty and transparency for creditors, particularly where commencement would affect their ability to exercise their rights. It was noted that entry criteria that were designed to facilitate early and easy access to the process would also facilitate the court's consideration of the application for commencement and that the question of timeliness thus was closely linked to what the court was being requested to do in making that commencement decision.

38. One view was that the decision for commencement should flow more or less directly from the simplicity of the entry criteria, avoiding the likelihood of delay and dispute. It was noted that in some systems, a voluntary application by a debtor was an acknowledgement of insolvency and would function as an automatic commencement, unless it could be suggested that the debtor was abusing the process to evade its creditors. With respect to reorganization, it was pointed out that the purpose of the entry criteria was to derive a standard that could create a presumption or *prima facie* case of insolvency. In such cases, unless the debtor's application was disputed, there should be no delay in commencing the proceedings, although commencement would not be automatic and some formal decision from the court was required. Another view was that the entry criteria was only the start of the process and the court would be required to carefully consider a number of related issues, such as whether the proceedings sought were the most appropriate for the debtor, before making a decision to commence the process. It was noted in response to that view that questions of assessment of the debtor and of the proceeding most appropriate to the debtor could be addressed through provision for conversion between liquidation and reorganization. There was support for the view that while a debtor application could operate to affect almost automatic commencement, that was not the case with an application by creditors which would be required to be determined in a timely manner.

39. The view was expressed that although a quick decision was desirable, the time period within which a decision could be made in practice differed from case to case and therefore it would be impractical to set time limits. Where laws did set time limits, it was pointed out that they were often ignored and it was difficult to establish effective sanctions to enforce such limits, particularly where it was a court (as opposed to an administrative authority) that was not observing the limit. It was observed that sanctions might be more appropriate to ensure that the debtor or creditor pursued its application in a timely manner. Another view was that a fixed time limit should be set to ensure certainty and transparency for both creditors and the debtor.

40. After discussion, the general view was that a flexible approach was required which would emphasize the desirability of speed and provide guidance as to what was reasonable, but also recognize that countries needed to fit their insolvency regime within the overall constraints and resources of their judicial systems and local needs for determining priority.

(d) *Notice requirements*

41. The Working Group considered the proposal contained in paragraph 54 of A/CN.9/WG.V/WP.54/Add.1 that notice of the application should be provided to the debtor (in the case of a creditor application) and to the creditors (in the case of a debtor application).

42. The Working Group agreed that notification of the insolvency proceedings was not only appropriate, but also crucial in order to ensure transparency of the insolvency system, in accordance with one of the major objectives pursued by the UNCITRAL Model Law on Cross-Border Insolvency and to ensure equality of information for creditors in the case of voluntary proceedings.

43. As to the time at which notification should occur, the prevailing view was that notification to the debtor and, respectively, to creditors should be treated differently. The concern was widely shared that immediate notification of an application filed by either creditors or a governmental authority (i.e., of an involuntary proceeding) to the debtor would be appropriate. Notification to the creditors prior to commencement on a debtor application, however, might be counterproductive as it could unnecessarily affect the position of the debtor in the event that the application was rejected and might encourage last minute actions by creditors to enforce their claims. The suggestion that such prejudice to the debtor would not be relevant in the case of a voluntary proceeding because the debtor had already made an assessment as to its insolvency did not receive support. It was noted that those issues would not arise in legal systems where commencement was an automatic effect of application.

44. After discussion, the Working Group agreed that notification of involuntary proceedings should not occur prior to commencement. It was noted that that solution was also consistent with the approach taken in Article 14 of the UNCITRAL Model Law on Cross-Border Insolvency, which clearly referred to commencement as the basis of notification. The Working Group also welcomed the suggestion that the draft Guide provide some guidance both as to the party required to give notice (e.g. the debtor or the court) and to the ways to ensure that the notification was effective.

### **3. Consequences of commencement of insolvency proceedings**

(a) *The insolvency estate*

45. A general view was that the importance for national laws to provide clear rules as to the assets to be included in the insolvency estate needed to be stressed, to the benefit of both domestic and foreign creditors.

46. As to the specific assets which should be included, the general view was that all the assets in which the debtor had an interest as of the date of the commencement of the insolvency proceedings should be included, whether tangible and intangible and irrespective of whether those assets were in the actual possession of the debtor. The view was also shared that the insolvency estate should also include any assets acquired by the insolvency representative after the commencement of the insolvency proceedings. It was further suggested that specific contractual arrangements, like transfers created for the purpose of security, trusts or fiduciary arrangements and consigned goods, needed to be addressed. It was also observed that it would be useful if the draft Guide would expand the explanation of the notion of tangible and intangible assets.

47. Various views were expressed as to whether assets subject to a security interest in favour of a creditor should also be included. Some support was expressed for the view that as a general rule those assets should be excluded, unless one or more of them proved to be essential to the possibility of successful reorganization. It was pointed out that such a principle would significantly enhance the availability of credit, since it would reassure secured creditors that their interests would not be adversely affected by the opening of an insolvency proceeding.

48. However, support was expressed in favour of the view that secured assets should be included in the insolvency estate. It was observed that allowing secured creditors to enforce their rights on secured assets might not only impair the principle of equal treatment of creditors, but also the possibility of carrying out a successful reorganization. It was explained that retention of essentially all assets pertaining to the debtor at the outset of the procedure was crucial to achieve reorganization of the business. In that connection, it was also clarified that including secured assets in the insolvency estate would not be tantamount to saying that secured creditors would be deprived of adequate devices to preserve their rights. The view was also expressed that the emphasis should not be so much upon inclusion or not in the estate but whether the secured assets would be subject to the insolvency proceedings.

49. A proposal that secured assets should be subject to a different regime in liquidation as opposed to reorganization did not receive support.

50. A further view was that all assets pertaining to the debtor should be included in the insolvency estate irrespective of their geographical location, since that would be consistent with the approach taken in the UNCITRAL Model Law on Cross-Border Insolvency. In response, it was noted that the draft Guide was not intended to address questions of relevance to cross-border aspects of insolvency law, since those matters were addressed in the Model Law, which the current work was not intended to in any way modify or amend.

51. Wide support was expressed for the idea that, when the debtor was a natural person, some assets might be excluded from the insolvency estate. As to the identification of exempted assets, a suggestion was that exclusion should apply to claims for personal damages. After discussion, the Working Group agreed that, given the different approaches taken in various legal systems, it would be inappropriate for the draft Guide to include excessive details and that specific listing of exempted assets should be left to national laws. In that connection, the Working Group agreed that the draft Guide should recommend to national legislators to clearly identify those exemptions and to limit their number to the minimum necessary to preserve the personal rights of the debtor. It was further suggested that the text should identify and discuss the various policy options possibly underlying the different approaches taken in different countries.

52. The issue of the treatment of third-party-owned assets was also discussed. A concern was that, if those assets were to be excluded from the scope of the insolvency estate, the possibility to achieve reorganization would be significantly impaired. It was noted that in most cases at least some of the assets used for the operation of the business were in the ownership of a party other than the debtor and were retained by the latter on the basis of contractual agreements, including leases and the like. A suggestion was to include in the draft Guide the principle that third-party assets were not included in the insolvency estate, unless those assets were necessary to continue or maintain the operation of the business and provided that adequate provision was made for protection

of the lessor to the extent that those assets were utilized in the insolvency proceeding. That suggestion was supported.

53. Another view was that third-party assets should be treated differently depending on whether liquidation or reorganization was at stake. It was observed that, while in reorganization retention of assets in the possession of the debtor might prove crucial to the very possibility of rescuing the business, those needs did not arise in respect of liquidation. A different view was that preventing dismemberment of the estate at the outset of the procedure might prove crucial also for the purposes of ensuring the maximization of value within the context of liquidation.

54. A further view was that the issue of treatment of assets retained by the debtor pursuant to a contractual agreement should be addressed in the context of treatment of contracts rather than in the insolvency estate. In that connection, the view was widely shared that the rights of the owner under the contract should be restrained in order to ensure that the asset remained at disposal of the insolvency proceeding. In that connection, it was clarified that insolvency law would not affect title to the assets, but only limit the way in which those rights were exercised, with a view to preserving the needs of an insolvency proceeding.

55. The discussion showed that the notion of insolvency estate varied among the different legal systems: some laws appeared to consider the issue of third-party assets as pertaining to the rights of property, while some others appeared to address it within the context of treatment of contracts. However, the prevailing view was that the insolvency law should provide some mechanism to ensure that third-party assets used in the operation of the business remained available to the insolvency proceeding, both for the purposes of reorganization and with a view to maximizing the value of the assets subject to the proceedings.

56. General support was expressed for the right of the insolvency representative to recover property of the debtor that was improperly transferred in violation of the principle of equal treatment of creditors. Support was also expressed for the suggestion that the draft Guide clearly state the policy reasons that would justify such a right of recovery. A number of suggestions were made as to the kind of acts that would be subject to recovery and to the time periods in which recovery would be possible. A view was that, while the proposed text seemed to adopt an approach relying on the intention of the party, many legal systems relied rather on the detrimental effect of the transaction subject to avoidance and that in that respect a policy decision was needed. In response, it was noted that, given the variety of approaches taken by different legal systems in that field, the draft Guide should not include excessive details as to the conditions upon which that right of recovery could be exercised. It was also noted that detailed distinctions as to both the type of transactions and the relevant time periods were presented in the section of the draft Guide specifically devoted to avoidance actions. Accordingly, the Working Group agreed to defer further detailed discussion of that issue to a later stage.

*(b) Stay of proceedings*

57. In considering whether the application of the stay should be automatic or discretionary and whether it should apply on application for, or commencement of, insolvency proceedings the Working Group agreed on the need to distinguish between applications for liquidation and reorganization proceedings and the parties that may

make the application. It was observed that while the reasons for automatic application of the stay were clearly set forth in the draft Guide, the discussion of the advantages of a discretionary application needed to be expanded. It was recalled that the UNCITRAL Model Law on Cross-Border Insolvency addressed the issue of application of a stay and suggested that the approach adopted in the draft Guide should be consistent with the Model Law.

58. With respect to unsecured creditors, it was suggested that the stay should apply automatically to all creditors on an application for both liquidation and reorganization proceedings, irrespective of whether the debtor or creditors applied. Where the application was one for liquidation, continuation of the stay after commencement could be discretionary, but in cases of reorganization, the automatic stay would continue to apply after commencement. It was noted that a distinction might need to be drawn between those cases where the business was to be sold as an operating entity in liquidation proceedings and straightforward liquidation of the enterprise. A different suggestion which received some support was that the stay (which should apply automatically in both liquidation and reorganization proceedings, irrespective of whether those proceedings were initiated by the debtor or by creditors) should apply on commencement of the proceedings. To address the period between application and commencement, it was agreed that provisional measures should be available. Support was also expressed for the stay to apply automatically from the time of application where it was the debtor that applied, in order to avoid potential abuse by creditors. It was pointed out that such automatic application was of particular relevance in legal systems where an application made by the debtor led to automatic commencement without the need for any formal decision by the court.

59. As to the question of application of the stay to secured creditors, the general view was that if the secured interests were to be included within the scope of the stay it should be emphasized in the draft Guide that such inclusion should not be seen as a negation of the secured rights. The view was expressed that restricting the exercise of secured rights was necessary in both liquidation and reorganization proceedings to ensure that the goals of those proceedings could be realized, but that that had to be balanced by the maintenance and protection of secured rights. A contrary view was that secured creditors should not be included within the scope of the stay. It was suggested that to do so could undermine party autonomy and the bargain reached between the debtor and the secured creditor. In support of that view it was suggested that a system which applied the stay to secured creditors and sought to balance any negative impact by protecting the value of the secured interest was likely to be complex, costly and require the court to be able to make difficult commercial decisions on the question of appropriate protection. Where the stay did not apply to secured creditors, the matter was appropriately left to negotiation between the interested parties. On that point it was noted that there was a clear balance in many systems between the need for a stay and the availability and effectiveness of pre-commencement negotiations to achieve agreement between the debtor and creditors on how to proceed. It was pointed out that in a number of legal systems, pre-commencement negotiation was effective in achieving agreement between the debtor and its creditors so that a stay was not required. An alternative approach which received some support was to combine the automatic application of the stay on commencement for a short period to enable the financial situation of the debtor to be evaluated with a view to determining how the proceedings should continue, with provision for the stay to be lifted on application to the court where it could be shown that the value of the collateral was being adversely affected.

60. On the question of preferential or priority creditors, it was noted that there were different uses of those terms in different legal systems and that the draft Guide needed to explain those differences clearly. For example, in some systems priority creditors were creditors with possessory interests, while in others they had only a distribution priority. A related issue was the different rights that might be held by those different types of creditors and whether or not they were within the scope of rights to be affected by the stay. A general view was that a number of those types of creditors would be within the category of unsecured creditors affected by the stay, but it was suggested that the draft Guide should address the issues clearly.

*(c) Treatment of contracts*

61. The Working Group addressed the issues of termination, continuation and assignment by the insolvency representative of contracts that were outstanding at the time of commencement. As to termination, a general view was that there was a direct link between the ability of the insolvency representative to terminate contracts, on the one hand, and the level of availability of credit, on the other hand. It was observed that the wider the right of the insolvency representative to terminate, the higher the cost and the lower the availability of credit would be and that a careful balance needed to be struck between those two conflicting needs.

62. The issue of possible automatic termination of a contract in the absence of a decision to continue by the insolvency representative within a specified period was discussed by the Working Group. A view was that providing for such automatic termination might prove useful to avoid costs of litigation in respect of situations where it was clear that the debtor was not in the position to perform the contract. Furthermore, it was noted that failure to provide a mechanism for automatic termination would result in imposing on the insolvency representative the burden to notify the decisions in respect of all outstanding contracts, increasing the costs of the procedure.

63. However, the prevailing view was that the provision contained in the summary section (paragraph 113 (b) of document A/CN.9/WG.V/WP.54 Add. 1), stating that termination might be automatically effective in the absence of a decision to continue within a specified period of time, was too broad. Several views were expressed as to how the scope could be more focussed. One suggestion was that the text clarify that automatic termination would only be possible when expressly provided by the contract. In that connection, it was pointed out that allowing automatic termination as a general principle might expose the debtor to the risk of being deprived of some supplies which might be essential to the continuing operation of the business (such as electricity, water and the like). In response, it was noted that the rule was not aimed at giving the power to terminate the contract to the other contracting party, but rather at enabling the insolvency representative to avoid having to give notice of the decision to terminate. It was further clarified that the provision was not aimed at amending the rights that the other contracting party had under the contract. Another suggestion was to specify the period of time after which automatic termination would apply.

64. Another view was that automatic termination should be limited to some categories of contracts, as expressly identified by national laws. It was observed that, while supported by sound economic considerations, that mechanism might create an excessive amount of uncertainty, thus impairing the key objective of predictability of the insolvency system. A further concern was that automatic termination might give rise to

uncertainties when the insolvency representative was not adequately informed on the outstanding contracts.

65. It was pointed out that automatic termination was aimed at ensuring certainty: on the one hand, the mechanism forced the insolvency representative to make a timely decision in respect of the contracts outstanding at the time of commencement of the proceeding; on the other hand, it also offered the other party a way to eliminate uncertainties as to the continued existence of the contract within a reasonable period of time.

66. Another view was that the issue of automatic termination of contracts needed to be treated differently depending on whether liquidation or reorganization was at stake, given the different policies respectively underlying each proceeding. In that respect, it was observed that, while in liquidation it would be reasonable to assume that failure of the insolvency representative to take a decision in respect of a contract would most likely imply a decision to terminate, that assumption might not always be appropriate in reorganization.

67. The prevailing view was that the mechanism of automatic termination should be retained, subject to some limitations to its scope. Support was expressed for establishing in the draft Guide criteria that would guide the insolvency representative in making the decision as to whether to terminate the contract, bearing in mind that those criteria would be different for liquidation and reorganization. Furthermore, it was observed that outlining the policy reasons which might justify automatic termination would be most useful for those legal systems where the impairment of contractual rights required a specific justification.

68. In addition to the right to terminate contracts, it was suggested that the insolvency representative should have the power to disclaim other property included in the insolvency estate, whenever that property happened to be burdened in such a way that retention would require excessive expenditure. While some support was expressed for that view, it was observed that such a power would need to be accompanied by devices allowing disclaimed property to be vested in another person.

69. Support was also expressed in favour of the insolvency representative being able to ensure continuation of contracts. However, the Working Group agreed that that right should be limited in scope by excluding those contracts in respect of which continuation would be impossible: namely, contracts where the personal characteristics of the debtor were essential for performance of the contract. A suggestion was that examples (along the lines of those outlined in paragraph 106 of document A/CN.9/WG.V/WP.54 Add.1) should be included in the summary. Another view was that reference to the possible intervention of the court (as contained in the chapeau of paragraph 116 and in paragraph 116 (a) of document A/CN.9/WG.V/WP.54 Add.1) was inconsistent with the approach taken in respect of termination (where no reference to the court was made) and was therefore inappropriate.

70. Support was expressed in favour of mentioning the reasons underlying the right of the insolvency representative to continue the contract, as suggested in respect of termination. It was clarified that the right of the insolvency representative to continue the contract irrespective of the agreement of the other party should be balanced against the interests of the other party by some mechanism for compensation. It was also suggested that the other party should be given the right to be heard or consulted by the

insolvency representative prior to his or her decision as well as means to contest that decision.

71. As to the issue of assignment of contracts, one view was that the scope of the provision should be limited, as in the case of continuation. In that connection, it was pointed out that the possibility of assignment should be excluded in respect of those contracts in which the specific characteristics of the debtor were essential to performance. In that respect, it was suggested that the insolvency representative could not be vested with rights wider than those pertaining to the debtor under the contract.

72. After discussion, the prevailing view was that the right of the insolvency representative to assign the contracts outstanding at the time of commencement should be retained, subject to adequate limitations to its scope. In support of that view, it was also observed that under some circumstances termination may result in a windfall for the other contracting party (e.g. where the contract lease price was lower than the market price) and that providing for a contract to be continued and assigned may enable the insolvency estate to benefit from the difference between the contract and the market price.

73. As to the issue of non-assignment clauses, support was expressed in favour of enabling the insolvency representative to treat such clauses as null and void, but that the draft Guide should point out the consequences of such treatment vis-à-vis the other party. It was further noted that that solution was consistent with the approach taken in the draft Convention on the Assignment of Receivables in International Trade. Another suggestion was that the bracketed reference to "all parties" appearing in paragraph 118 (b) of document A/CN.9/WG.V/WP.54 Add.1 be clarified to make it clear that the reference was to the parties of the original contract and not to the parties of the assignment.

74. A general view was that the draft Guide should point out the need for excluding financial contracts (including currency swaps, interest rate swaps, derivatives and the like) from the scope of the provisions enabling the insolvency representative to interfere with contracts. It was observed that preserving the rights of financial investors (in particular, the right to net their positions, the right to terminate the contract and the right to claim for collateral in accordance with the rules and arrangements governing those contracts) was crucial in order to ensure the stability of the financial market as a whole. It was further noted that such special treatment appeared appropriate in the light of the peculiarities of those contracts and that such peculiarities had similarly led to their exclusion from the scope of application of the draft Convention on the Assignment of Receivables in International Trade. While that view was supported, it was also agreed that the reasons supporting a special regime for those contracts, entailing a significant exception to the principle of equal treatment of creditors, should be pointed out in the draft Guide.

75. Wide support was expressed in favour of the view that employment contracts should be subject to a special regime, given the strong social implications of their treatment within the context of insolvency. A suggestion was that the draft Guide should mention the social policy considerations underlying the issue and the reasons justifying their exclusion from the scope of the general rules. A further suggestion was that the draft Guide recommend that the limited power of the insolvency representative to terminate those contracts should also be expressly mentioned in the insolvency law, for the purpose of transparency.

76. The prevailing view was that the issue of set-off should be dealt with in the draft Guide. The suggestion that that issue should not be addressed in the context of treatment of contracts, being rather an issue of general private law, was not supported.

*(d) Avoidance actions*

77. At the outset of the discussion in the Working Group it was observed that avoidance actions were potentially very expensive to run and it was suggested that the Working Group should direct its attention towards devising criteria that would assist in simplifying those actions. It was noted that in some legal systems an individualized approach which considered in some detail questions such as the intent of the parties to the transaction and what might constitute the normal course of their business arrangements had led to excessive litigation. That subjective approach had now been changed to a more simple objective approach which combined a short time limit for the suspect period (3-4 months) with an arbitrary rule that all transactions occurring within that period would be suspect unless there was a roughly contemporaneous exchange of value between the parties to the transaction.

78. It was noted that the potential expense of avoidance actions had led some legal systems to consider how those costs might be funded. Possible approaches included allowing individual creditors to pursue the action where the insolvency representative chose not to pursue it, provided other creditors agreed; permitting the insolvency representative to assign the action for value to a third party; and allowing the insolvency representative to approach a lender to advance funds with which to commence the avoidance action. It was noted that some of those approaches would result in the creditor taking the action being able to cover its claim out of the funds recovered or at least some part of it. In other systems, it was noted that the government would provide funds for the insolvency representative to take not only avoidance actions to recover funds, but also actions against directors. Some concern was expressed with regard to approaches that might serve the interests of individual creditors and depart from the collective nature of the insolvency proceeding. In support of mechanisms that allowed private funding, it was pointed out that there were vast differences between countries in the availability of public resources for funding avoidance actions. An additional difficulty could arise where such actions were required to be funded from the assets of the estate, particularly as that might operate to prevent the recovery of assets which had been removed from the estate with the specific intention of hindering avoidance actions. After discussion, support was expressed in favour of a mechanism that would allow creditors to pursue recovery where the insolvency representative was unwilling to do so or to obtain external funding where no other option was available.

79. The Working Group discussed the types of transactions that might be subject to avoidance actions as set forth in paragraphs 125-129 of document A/CN.9/WG.V/WP.54/Add.1. As a preliminary point it was noted that the power to take avoidance actions should be available in both liquidation and reorganization. It was pointed out that reorganization, like liquidation, involved allocation on the basis of priorities. Accordingly where a creditor had obtained a benefit shortly before commencement that would affect its priority it should not be able to retain that benefit.

80. On the issue of the scope of avoidance powers, it was suggested that the draft Guide should refer to transactions rather than to payments or to transfers, as the latter two terms were too narrow. It was also suggested that the principal categories of avoidable transactions should be fraudulent, undervalued and preferential transactions, with other

categories such as invalid security interests, gifts, setoffs, unauthorized transfers occurring after initiation of insolvency proceedings and transactions seriously inconsistent with normal commercial transactions included as specific examples of those three categories. In discussing those various categories, the draft Guide should indicate the categories of transactions that would be void and not merely suggest which transactions might be avoidable. A further suggestion was that the draft Guide should focus not simply upon the types of transactions as described above, but also upon the consequences of the transaction and the relationship between the parties involved in the transaction. In terms of the consequences, the example was given that directors might seek to pay off all the liabilities which they had guaranteed in the period before insolvency. While the payments in themselves might be acceptable, the effect of such payments needed to be considered. As to the relationship between the parties, it was noted that transactions with insiders might require special attention. It was recalled that the Working Group had agreed to the exclusion of financial transactions from the power of the insolvency representative to interfere with contracts and that therefore they should not be subject to avoidance.

81. As a general point with regard to the suspect period, one view was that the periods should be set forth in the law and not left to retrospective determination by the courts, since that approach did not assist clarity and predictability of the law. Another view was that a degree of flexibility could be added to the law by allowing the court to extend the fixed periods in certain circumstances. It was noted that some countries adopted this combination of objective and subjective criteria. In response, it was pointed out that such an approach might not serve the goals of predictability and certainty that were key objectives as noted in Part One of the draft Guide. It was nevertheless suggested that there might be circumstances in which extension of the suspect period might be appropriate, for example, where a transaction that had been concealed had the effect of diminishing the estate. It was also pointed out that the draft Guide needed to be clear on when suspect periods commenced i.e. whether on application or commencement (where that meant the making of the insolvency decision) of the insolvency proceedings.

82. In respect of fraudulent transfers, the Working Group agreed that they should be subject to avoidance. In terms of a suspect period, one view was that avoidance of transactions on the basis of fraud should not be restricted to a particular time. Another view was that a time period was required but that it should be long.

83. On the issue of burden of proof, it was suggested that the question to be considered was whether the transaction was intended to, or had the effect of, hindering, delaying or depriving creditors of value. It was observed that since intent was the essential element of fraud, it would not be sufficient for the transaction to have the effect of defeating or delaying creditors unless that effect was intended. In addition, it was suggested that the fraudulent intent must be recognizable to the other party to the transaction. As a practical matter, it was observed that if a party could not explain the commercial purpose of a particular transaction which extracted value from the estate it would be relatively easy to show that the transaction was fraudulent. The Working Group's attention was drawn to the need to bear in mind that many transactions that were perfectly valid under non-insolvency law were potentially fraudulent under insolvency law.

84. With respect to the question of whether the transaction should be automatically avoided by operation of the law or voidable on the application of the insolvency representative, it was noted that a distinction had to be made between fraudulent transactions, which could not be automatically avoided and the other types of

transactions which could be automatically avoided by reference to a fixed suspect period.

85. In discussing transactions at an undervalue, it was pointed out that there was a need to distinguish between those transactions involving creditors and those involving third parties, as the latter could also be classified as gifts. It was suggested that a long suspect period was required for transactions at an undervalue.

86. In relation to preferential transactions, it was noted that the criterion was whether the transaction involved a contemporaneous exchange of value. Examples could include irregular payments made in respect of debts not yet mature. It was suggested that such transactions were broader than just payments to creditors and should include not only transactions for the benefit of creditors, but also transactions with third parties. In response, it was pointed out that the preferential nature of the transaction would be hard to define in the context of third parties and that transactions involving a preference to third parties could be classified as transactions at an undervalue or as gifts (although it was noted that some legal systems might permit certain gifts to be made). It was suggested that transactions involving payment in kind could also be included. As to the suspect period required, it was suggested that it should be shorter than that applicable in the case of fraudulent or undervalued transactions.

87. Some concern was expressed as to what invalid security interests as a category of avoidable transaction referred to. It was generally agreed that that category would cover security provided on the basis of past consideration. It was suggested, however, that it might also include securities such as liens that were not properly perfected and could be avoided under non-insolvency law. The Working Group added that, as a general matter, the issues relating to the validity or invalidity of secured interests should properly be the province of the relevant secured transactions law and should be the subject of cooperation between the Working Group on Insolvency Law and the Working Group that will commence its work on secured transactions in May 2002.

88. The view was expressed that setoff was not avoidable as such, but that it might be where the effect of the setoff was to alter the balance of the debt between the parties to the setoff in such a way as to create a preference, or where the setoff occurred in irregular circumstances such as where there was no contract.

89. Where unauthorized transactions occurred after the application for the proceedings and before commencement, the transaction should be void, not voidable to avoid disputes. In respect of a further category, that of transactions inconsistent with normal commercial practice, the view was expressed that it was more in the nature of a defence to an allegation of a preferential transaction where it could be shown that the transaction was consistent with normal practice or consistent with the normal course of dealings with the particular creditor. A contrary view was that those types of transactions should be included as a separate category. It was suggested, however, that the criteria of "inconsistent with normal commercial practice" would be difficult to determine, particularly where the transaction appeared on the surface to be in the ordinary course of business, but only on close examination was revealed not to be. It was also noted that such criteria raised an issue of who should be charged with making that determination.

#### 4. Administration of proceedings

##### (a) Debtor's rights and obligations

90. It was generally felt that the issue of the rights and obligations of the debtor were different in liquidation and reorganization. Where the business was to be continued (either for sale as a trading entity or reorganization) a greater need for debtor involvement arose.

91. General support was expressed for the obligation of the debtor to disclose in a timely manner full information as to the financial and economic situation of the business, with a view to preserving confidence and allowing proper evaluation of the business by the insolvency representative. In respect of reorganization, it was noted that prompt submission of information by the debtor might be useful to enhance the confidence of the creditors in the ability of the debtor to continue managing the business. A suggestion was that that duty should extend to all relevant information and include information also in respect of the years prior to the initiation of the proceeding.

92. In respect of reorganization, the Working Group agreed that continuing involvement of the debtor in the management of the business was desirable and appropriate. The possible advantages of that approach, especially in respect of individual businesses or small partnerships, were pointed out. Where the debtor retained a significant role in management, such as in the debtor-in-possession approach, supervision by the court was necessary (and might include the appointment of an insolvency representative). It was generally felt that the powers given to the debtor within the context of reorganization should be balanced by providing efficient mechanisms enabling creditors to take appropriate action. In that connection, it was observed that the primary responsibility of the debtor after the commencement of the proceeding would be vis-à-vis the creditors rather than to the shareholders. It was further observed that the power of the court to appoint an officer to act as mediator would be useful to address situations where the apathy of creditors might hinder the preparation and approval of the reorganization plan. Another suggestion was that differences in treatment of rights and obligations of the debtor might be introduced depending on the size of the enterprise.

93. Support was expressed in favour of an approach that relied on sharing of rights and responsibilities between the debtor, on the one hand, and the insolvency representative appointed by the court, on the other hand. Under that approach, the debtor would continue to run the business on a day-by-day basis while the insolvency representative would supervise relevant transactions and be responsible for the implementation of the plan.

94. After discussion, the Working Group agreed that it would be advisable to draw a distinction between the period between initiation of the insolvency proceedings and the approval of the reorganization plan, on the one hand, and the period following that approval, on the other hand. It was felt that, while in the first time span it would be appropriate for legislation to set out specific rules and provide for an independent representative to be involved, a more flexible approach, giving a wider scope to party autonomy, might be advisable during the period following the approval of the plan and throughout its implementation, with a view to enhancing the chances for successful reorganization.

95. The Working Group discussed the issue of the right of the debtor to be heard. A concern was that, if stated as a general principle, that right might lead to formalities and costs unnecessarily impeding the course of the proceeding, especially in the context of a liquidation proceeding. It was therefore suggested that that right be limited to situations where the debtor had an interest, in respect of both its financial situation and its personal rights. In response, it was noted that some systems considered the right to be heard as a fundamental right of a constitutional nature and that restrictions thereto might result in making it more difficult to grant recognition of procedures carried out in systems allowing those restrictions. It was further noted that providing for the debtor to be involved in decisions as a general rule might ultimately enhance the confidence in the insolvency system. Accordingly, it was agreed that the draft Guide should emphasize the need to avoid the exercise of that right resulting in abuse which would adversely affect the expeditious carrying out of the procedure.

96. A further suggestion was that issues such as the release from restrictions imposed on an individual debtor as a consequence of commencement, as well as discharge from all or some debts following termination of the procedure, should be addressed in the draft Guide.

*(b) Insolvency representative's rights and obligations*

97. As to who should appoint the insolvency representative, it was suggested that any solution should foster the selection of an independent and impartial person; the appointment by the court or creditors was generally considered as more conducive to independence and impartiality than the leaving the appointment to the debtor. In that regard it was noted that debtor appointments had the potential to lead to substantial disputes concerning creditor claims and discrimination towards creditors. It was further noted that there was a trend towards appointment of the insolvency representative by an independent appointing authority that could draw upon professionals with experience and knowledge of relevant sectors.

98. Statements were made regarding procedures that governed the selection of insolvency representatives in various countries; those statements were made by way of information or as suggestions to be taken into account in formulating recommendations for the draft Guide. Those included that the prospective insolvency representative should be required to disclose circumstance that might indicate a conflict of interest or lack of independence; that candidates for the office had to undergo training by specified institutions and be licensed; that representatives were chosen from a roster under systems that were designed to be fair to representatives (in terms of distributing cases in which assets did not allow for a full remuneration of the representative) but did not necessarily guarantee the choice of the most appropriate person in each case. It was observed that in establishing such procedures and requirements, one should be mindful that overly stringent requirements had the disadvantage of raising the costs of proceedings, while requirements that were too low would not guarantee the quality of the service required.

99. On the question of the qualifications required of an insolvency representative, the view was expressed that paragraph 145 of document A/CN.9/WG.V/WP.54/Add.1 adequately reflected the issues to be considered. It was suggested that a reference could be added to the need for the insolvency representative to be a "fit and proper" person and the fact that it performed different fiduciary roles. It was also suggested that the draft Guide might make mention of the need for a public officer to be appointed in cases

where an insolvency case could not assigned for a private insolvency representative where, for example, there were no assets to fund the administration of the insolvency.

100. It was recognized that the insolvency representative was to be subject to standards of responsibility, but that those standards should be in line with the circumstances in which the representative took decisions; in that light, suggestions were made that the standard of responsibility was not to be more stringent than that of a manager of a company, that it should be along the lines a standard expected of a prudent person in his or her position or that the standard be based on the expectation that he or she act in good faith on proper purposes; it was stated that the standard of care should not be too stringent (in particular should not be the standard of care applied in tort cases) so as not to invite law suits against the representative and thereby raise the costs of the service.

101. It was suggested that the provisions on replacement or removal of the representative should be linked to the representative's failure to act according to the required standard, with the reservation that, depending on the role and prerogatives of creditors given in the proceedings, it might be appropriate to leave the creditors free to remove the representative without having to give any justification therefor. In that respect it was suggested that where the draft Guide dealt with removal, whether or not for cause, it should also discuss the need for the insolvency law to provide for substitution and succession in title to the assets of the estate. It was noted that insolvency representatives were regarded in some countries as officers of the court, which determined their level of responsibility and grounds for removal.

102. As to the need for liability insurance of insolvency practitioners or an obligation to provide a guarantee to cover any breach of their duties (such as a bond by a surety company), it was suggested that those obligations should be in line with the proper distribution of risks among the participants in insolvency proceedings and should be balanced against the need to control the costs of the service.

*(c) Creditor claims*

103. The Working Group discussed the issue of submission of claims by creditors. One view was that a specified period of time within which that submission should occur was advisable for the purpose of certainty. A related view was that sanctions for late filing should be provided. However, the concern was raised that providing a specified time limit for submission of claims might result in discrimination against foreign creditors, who in many cases might not be able to meet the time limit. It was observed that that result would entail a violation of the principle of equal treatment of domestic and foreign creditors, as set forth in article 13 of the UNCITRAL Model Law on Cross-Border Insolvency. It was further pointed out that that result would be inconsistent with the international trend in insolvency law reform, which was clearly towards the abolition of any discrimination based upon nationality of the creditor. It was also clarified that the absence of a specified term would be of no detriment to the insolvency estate, provided that the claim was lodged prior to distribution of the assets and provided that any cost arising in connection with the late filing be borne by the creditor. Another view was that, if a time limit were to be introduced, it should not have a preclusive effect.

104. In response, it was observed that that concern could be adequately addressed either by introducing longer timer limits, or by providing a specific time limit for foreign creditors, as was already the case in some legal systems, or allowing the court to extend the time period upon evidence of serious impediment. It was also suggested that that

option should also be open to domestic creditors. It was further noted that the question of late filing of claims by foreign creditors was closely related to provision of adequate notice to those creditors and that the draft Guide should refer to the obligation to adequately inform foreign creditors set forth in the UNCITRAL Model Law on Cross-Border Insolvency. It was also observed that the establishment of an international database containing information drawn from national commercial registries would be useful to provide timely information to creditors and assist in ensuring equal treatment of creditors.

105. With regard to foreign creditors, the issue was raised as to whether claims could be submitted in a language other than the one of the insolvency proceedings. The Working Group agreed that allowing a creditor to submit the claims in its own language might significantly facilitate access of foreign creditors. Accordingly, it was suggested that the draft Guide recommend that national laws reduce the constraints deriving from documents having to be submitted in a specific language or be subject to specific formalities such as translation and notarization required by national law.

106. It was pointed out that equal treatment of foreign creditors was linked to the issue of conversion of claims expressed in a currency other than the one of the country of the insolvency proceeding, namely in respect of the time at which that conversion were to take place. It was noted that, due to the continuous fluctuations of currency rates, establishing the conversion at the commencement of the proceeding, rather than at the time of filing or of distribution, might result in significant variations in the amount of the claim. The view that conversion should occur at the same time when interests on claims ceased to accrue, i.e. at the time of commencement, was not supported. The Working Group agreed that the draft Guide should draw the attention to that issue, outlining the various options available without however suggesting a specific approach.

107. The idea that the statement of claims should be prepared by the insolvency representative rather than by the court received wide support, since it was felt to be consistent with the desirable objective of reducing the formalities encumbering the process of verification of claims. It was pointed out that those formalities could be further reduced if admission of claims on the basis of appropriate declarations (such as affidavits) entailing penal sanctions in the event of fraud, as well as inclusion of claims evidenced by properly kept accounting books, were allowed. Notwithstanding general support for the goal of ensuring effectiveness and simplicity, it was however pointed out that the draft Guide should clarify that the decisions of the insolvency representative to either admit or reject a claim would be subject to appeal to the court.

108. A concern was that that solution relied heavily on the discretionary powers of the insolvency representative and might therefore easily lend itself to delays or even collusion with the debtor, thus undermining the predictability of the system. Therefore, it was suggested that claims outstanding at the time of commencement should be admitted on an automatic basis, without prejudice to the possibility to resort to court in order to contest admission or exclusion of a specific claim. It was observed that such a system would need to be accompanied by a mechanism aimed at ensuring that adequate information as to the claims included on an automatic basis be available to all interested parties.

109. The advantages of a system providing for automatic admission of claims were recognized by the Working Group. It was observed that admission of claims on an automatic basis would avoid most of the difficulties linked with the insolvency

representative having to make a precise assessment of the situation at the outset of the proceeding to enable creditors to participate in and vote at meetings held at an early stage of the proceedings. After discussion, it was agreed that both options should be retained in the draft Guide and presented as possible alternatives for adoption.

110. Various views were expressed in respect of the types of claims that should be excluded. It was observed that, while many countries currently took the approach of excluding foreign tax claims, there was no reason why national legislators would not be free to admit them, if they so wished. While it was suggested that foreign tax claims should be given the same treatment as domestic tax claims, the prevailing view was that the draft Guide should set forth the various alternatives available to national laws without recommending a specific approach. It was also stressed that the draft Guide should remain consistent with the approach reflected in article 13, footnote 2 of the UNCITRAL Model Law on Cross-Border Insolvency, providing that the equal treatment of foreign creditors did not affect the exclusion of foreign tax and social security claims from the insolvency proceeding.

111. With respect to the exclusion of fines and penalties, support was expressed in favour of providing a different treatment for, respectively, fines and penalties of a strict administrative or punitive nature (such as fines imposed as a result of an administrative or a criminal violation) and fines and penalties having a compensatory nature. While exclusions of claims of the first nature was generally deemed justified, it was felt that there would be no reason to exclude claims belonging to the second category. A further view was that there was no sound policy reason supporting exclusion of fines and penalties, since unless they were provable, they could not be collected unless they were not subject to the stay. In response, it was observed that that exclusion might be justified with a view to increasing the assets available for unsecured creditors.

112. As to gambling debts, it was pointed out that the reason why in most systems those debts were excluded from admission was that they arose from activities not permitted by the law. Accordingly, it was agreed that the draft Guide should rather focus on the general principle that claims arising in connection with activities which national law considered unlawful, and thus unenforceable, could not be admitted. Furthermore, it was observed that exclusions based upon public policy reasons should also remain unaffected by the insolvency law.

113. Given the different policy options which might support each of those exclusions, it was suggested that the draft Guide should bring examples as to the types of claims that national law might wish to exclude and the different approaches that might be taken from the standpoint of the insolvency law.

114. A suggestion was that claims held by persons connected to the debtor should be subject to a special regime, where they would be subordinated to all other claims and excluded from voting. In response, it was observed that the draft Guide should not suggest a specific treatment for those claims but only remind national legislators of the need to address them.

115. As to the submission of claims by secured creditors, one view was that those claims should be admitted on a provisional basis, due to the difficulties to make a precise assessment of the value of the collateral at the outset of the proceeding. In that respect, it was noted that providing for submission of secured claims, even on a provisional basis,

would be useful for the purpose of informing the insolvency representative of their existence.

116. General support was expressed for the suggestion that the draft Guide clearly point out the existence of different classes of creditors, each of which was characterized by its own rights and prerogatives. While it was felt inappropriate for the draft Guide to suggest which classes should be given priority or what treatment should be reserved to each of them, the prevailing view was that clear identification of the admitted classes, as well as of the prerogatives respectively pertaining to each of them, should be recommended to national legislators. It was also felt that any difference in treatment depending on whether liquidation or reorganization was at stake should also be clearly pointed out by national laws. The view was shared that, as a matter of general policy, the draft Guide should recommend that equality of treatment among creditors should be pursued and that any exceptions had to be supported by clearly identified policy reasons. Support was also expressed for the suggestion to include in the draft Guide reference to the financial and economic impact of the various approaches that could be taken at the legislative level.

117. With respect to the treatment of loans granted by shareholders, a view was that those loans deserved a regime which took into account the specific reasons usually underlying their issuance, which would not necessarily be the same as in the case of loans by other entities. As a general remark, it was pointed out that the draft Guide should make national legislators mindful of the possible implications of legislative choices at a corporate governance level.

118. The suggestion that the draft Guide should address the issue of the treatment of joint obligations under insolvency law received significant support. In particular, it was suggested that it should address whether and to what extent the commencement of the insolvency proceeding would affect the right of a creditor to enforce the claim against one or more joint debtors other than the one subject to the proceeding. In that respect, a further view was that treatment of guarantors should be included in the draft Guide and that the situation where the guarantor was also insolvent should be addressed.

119. A further view was that the draft Guide should recommend to specifically address the issue of treatment of unsecured claims acquired after commencement of the insolvency proceedings by outlining the different approaches available under various legal systems. Another suggestion was that the issue of set-off was critical to ensure equal treatment of creditors and should therefore be dealt with by the law as a specific issue of creditors claims.

120. Finally, the Working Group discussed whether the insolvency law should provide for a mechanism of what is in some legal systems known as "equitable subordination". It was pointed out that, in those systems which allowed it, that mechanism was aimed at ensuring equality of treatment of creditors by undoing or off-setting inequity in a specific claim that would produce injustice or unfairness to other creditors within the context of an insolvency proceeding. It was further clarified that that mechanism was deemed to be exceptional in nature and therefore available under specific circumstances and upon demand of the interested party to the court only. It was pointed out that the remedy would require that the inequitable conduct of the claimant had resulted in harming other creditors or conferring an unfair advantage on the claimant and that the granting of the remedy would not be inconsistent with insolvency law. Some situations usually allowing the remedy to be granted were mentioned, including: a fiduciary of the

debtor misusing its position to the disadvantage of other creditors; a third party controlling the debtor to the disadvantage of other creditors (for instance, by way of threatening to withdraw financing so as to force the business to be closed); or a third party defrauding other creditors (for instance, by way of submitting misleading information). Finally, it was noted that equitable subordination would be granted only up to the amount of the harm resulting from inequitable conduct and that it would not be available in respect of the exercise of normal rights conferred upon the creditor by either statute or contract, unless misconduct was shown.

(d) *Creditor committees*

121. Different views were expressed as to the role that a creditors committee could perform. One view was that creditors committees could perform a useful consultative role, assisting the insolvency representative by discussing difficult issues and providing advice but not participating directly in decision making. It might also have a role to play in checking upon the insolvency representative or the debtor's management where it retained a significant role in the day-to-day management of the business. Another view was that the creditors committee could play a more active role in decision making. In relation to how the committee might operate, it was suggested that there was a need for the powers of the creditors committee to be clearly stated, and to avoid disputes and, in particular, to ensure confidentiality, for the committee to operate on the basis of agreed rules.

122. It was suggested that whether or not a committee was needed might depend upon the nature and size of the case and whether it was a liquidation or reorganization. In liquidation, it was observed that a committee was not always needed, but that there might be exemptions such as in the case of the sale of the business, where the creditors committee could be a source of expert advice. On that basis, it was suggested that the committee should have a consultative role in liquidation. In reorganization, it was noted that the input of a creditors committee was generally useful and necessary, but that a flexible approach should be adopted as to what functions the committee should perform. It was suggested that, as a general proposition the committee should perform an advisory function with some clearly defined exceptions. Those would include the committee playing a central role in development of the reorganization plan, in the sale of significant assets, and where requested by the insolvency representative or directed by the court. With respect to those four instances, it was suggested that the committee should have the ability to appoint financial, legal and other advisers as required, but not where its function was only advisory.

123. In terms of the creditors to be represented on the committee, one view was that it should be limited to the largest unsecured creditors and not include priority or secured creditors. Another view was that representation should be determined on the basis of the size and type of debt, where the type of debt was to be determined by reference to criteria other than the secured or unsecured nature of the claim. A further view was that the insolvency regime did not have to specify which creditors should be represented, but should adopt a flexible approach which would allow creditors to choose their own representatives on the basis of willingness to serve and provide for enlargement or reduction of the size of the committee as required. Where the different types of creditors requiring representation was too diverse, it was suggested that different committees could be established to represent different interests, but that that approach should be taken only in the case of special interests such as tort claimants and shareholders. It was

also suggested that the insolvency law could stipulate which parties could not participate in the committee, such as the debtor or a party related to the debtor.

124. With respect to the liability of creditors committees, it was observed that the fact that members of the committee were not remunerated for participating in the committee would suggest a low level of responsibility. While it was noted that establishing liability for creditor committees was likely to promote creditor apathy, support was expressed for an approach based upon good faith which provided immunity for members in respect of actions taken by them in their capacity as members of the committee unless they were found to have acted improperly or to have breached a fiduciary duty to the creditors.

*(e) Post-commencement finance*

125. It was generally noted that it was essential for a business in reorganization to have access to cash flow if it was to be able to continue to trade and successfully reorganize. It was observed that in situations where it was permitted by the law, the debtor could use its cash collateral to secure finance, but where this was not available, post-commencement funding would have to be obtained in some other way. Examples were given of a "superpriority" (a priority that ranked in advance of administration expenses) and a "priming lien" (which ranked ahead of existing security interests but were rarely granted without the consent of the secured creditor). It was noted that post-commencement finance was likely to come from two types of lenders. The first was pre-insolvency lenders who had an ongoing relationship with the business and were likely to advance further funds in order to protect their existing claims and perhaps gain additional value through the higher rates charged for new lending. It was noted that that source of post-commencement finance was the most common. The second type of lender had no pre-insolvency connection with the business and was likely to be motivated only by the possibility of high returns. It was observed that the inducement for both types of lender was the predictability of the recognition accorded to post-petition lending and, in respect of existing lenders, confidence that their relationship to the debtor and the terms of their pre-commencement lending would not be changed.

126. Some concern was expressed with respect to the two forms of priority mentioned. It was suggested that the possibility of establishing priming liens might negatively affect the availability of credit to businesses in general. Only secured creditors who would be affected by the priming could agree to be displaced by such forms of security. The decision to obtain such finance therefore was not one that could be taken solely by the court, the insolvency representative or the general creditors. A further concern was how such a priority would be treated in the event that the reorganization failed and the proceedings were converted to liquidation, particularly as it might relate to the established priority for administration expenses. It was noted that a distinction needed to be drawn, in terms of the provision of finance, between the different stages of the reorganization process, such as the post-application, pre-plan and post-plan periods, with only the latter period being addressed by the plan. A question was raised as to whether the issue of post-commencement finance might not also be relevant in the case of the sale of the business in liquidation.

*(f) Reorganization*

127. At the outset of the discussion it was suggested that the draft Guide should include a discussion of why reorganization was desirable and the need in some countries to remove legal obstacles to the development of flexible procedures for reorganization that

could take account of the advantages and disadvantages of different procedures in combinations that would enable the goal of maximizing value to be achieved.

128. The Working Group discussed the development of secondary debt markets. Those markets had increased trading in debt that, in turn, had had an impact on the way in which relevant participants approached reorganization procedures. It was noted that banking practice had changed significantly in some countries over the last 20 years so that banks were increasingly selling their claims to better manage their risks and create liquidity, rather than waiting for long periods to receive a dividend from insolvency proceedings. It was observed that that trend had the potential to significantly complicate insolvency proceedings, because the parties negotiating a reorganization arrangement could change throughout the currency of the negotiations and because the objectives and interests of those secondary debt purchasers might differ from those of the original creditors, particularly in terms of their interest in returning a profit from their acquired debt rather than in the rescue of the business and the importance of ongoing business and commercial relationships.

129. Although it was apparent that insolvency law did not necessarily need to be changed to address that trend (and no examples of such changes were given), it was noted that there were implications for the insolvency process in terms of membership of creditor committees and the relationship of the parties that might purchase the debt to the debtor. With respect to creditor committees, it was noted that allowing debt traders to participate raised a potential problem of access to sensitive information that could assist their business. There was also a potential for debt traders to misstate the likely value of dividends to encourage creditors to sell at a discount at an early stage of the proceedings. A further issue was whether parties related to the debtor could purchase claims and if so, what mechanisms might need to be adopted to address possible problems. It was suggested, as an example, that a claim against the estate by such a purchaser could be limited to the amount actually paid for the debt, rather than the face value of the debt, where an unrelated third party could claim the face value of the debt. A further mechanism would be to exclude the votes on a reorganization plan of those related parties.

130. The Working Group considered the ways in which insolvency systems dealing with reorganization differed in terms of essential framework. Two principal models were identified, although it was pointed out that some issues were treated similarly in the different models. It was noted that one model relied upon the notion of providing adequate protection for secured creditors. Under that model governance issues would require greater involvement of the courts; there was a requirement for a stay to be applied, with different approaches being adopted as to the period of application of the stay and the period over which the business could be assessed; and there was provision for dissenting creditors to be bound to the plan where the secured claim was appropriately provided for and it was in the interests of all participants in the proceedings to do so (a "cram-down" provision).

131. The other model, used in systems with a strong secured creditor tradition, generally had no, or a limited, application of the stay of proceedings, with the period of the stay being used to evaluate whether a greater return could be expected from reorganization than from liquidation. Governance issues were normally dealt with by an insolvency representative; there was less court involvement than in the first model, as the question of adequate protection for secured creditors did not arise; and there was a reluctance to provide for a cram-down of secured creditors. An underlying assumption of the secured

creditor model was that the creditors would generally agree where it was demonstrated that the return in reorganization would be greater than in liquidation.

132. The question was raised of how the sale of a business as an operating entity should be treated and, in particular, whether it should be treated in the context of liquidation or reorganization (one of a number of questions posed to the Working Group on page 44 of document A/CN.9/WG.V/WP.54/Add.1). It was suggested that the sale of a business as an operating entity was not incompatible with liquidation and also would be a viable option in reorganization. It was agreed that for the purposes of discussion there should not be a strict delimitation drawn between the two procedures and that whatever was an appropriate procedure for the purpose of maximizing value should be available.

(i) Preparation of a plan

133. A number of options for preparation of the reorganization plan were considered. One suggestion was that preparation could be undertaken by the insolvency representative who was usually independent and would bring an objective viewpoint to the task, one that was not necessarily dictated by the debtor or the creditors. It was noted, however, that preparation of the plan by the insolvency representative would rarely occur without consultation with interested parties. Another view was that a distinction needed to be drawn between the secured creditor model where an insolvency representative was appointed and could prepare the plan and the debtor in possession model where there would be an allocation of responsibility between the debtor and the creditors. What was required, it was suggested, was a balance between the freedom accorded to the parties to prepare the plan and the restraints that necessarily attached to the process in the form of voting requirements, time limits for preparation of the plan, amendment of the plan and other procedural considerations.

134. After discussion, the Working Group agreed that a flexible approach should be adopted on the question of who should prepare the plan. In some cases it might be appropriate for the debtor or its representative to prepare the plan and be given an exclusive period to do so on the basis that that might operate as an incentive to the debtor to commence proceedings at an early stage. That incentive would have to be balanced against the need to ensure creditor confidence in the debtor and its proposal. In other cases, the creditors' committee or an individual creditor could prepare the plan, while a third option would be to allow an insolvency representative to prepare the plan.

135. On the issue of the time at which the plan should be prepared, one view was that it should not be at commencement as that was not likely to be a plan of substance and may operate to pre-empt proceedings and cause delay. Another view was that it should occur in the observation period after commencement. A further view was that preparation of the plan might take place before the insolvency application. After discussion, it was agreed that the Guide should reflect an approach where there was no requirement for the plan to be prepared before commencement, but that that option should be available.

(ii) Content

136. The general view was that the plan needed to provide certain minimum information in order to ensure transparency and confidence in the process. It was suggested that there was a need for the goal of transparency to be weighed against confidentiality concerns arising from creditor access to potentially sensitive commercial information; it was noted that in cases where the plan was approved by the court, that information would

generally be on the public record at some stage of the proceedings, but that consideration should be given by the court to protecting confidential information. It was suggested that the information to be included in the plan should include statements on the financial situation of the debtor, including both asset and liability and cash flow statements; details of the precise proposals included in the plan; details of what creditors would receive and how that would be more than they would otherwise receive in liquidation; and the basis on which the business would be able to keep trading and could be successfully reorganized. It was observed that the plan could not provide for any action that would be illegal or contrary to law as noted in paragraph 176 of document A/CN.9/WG.V/WP.54/Add.1, with an additional example being cited of tax laws. However, it was also noted that there might be laws that could impede implementation of the proposals that might potentially be contained in the plan, with one example being laws on foreign direct investment or foreign exchange limitations. Since some insolvency laws allowed those provisions to be overruled in certain circumstances, or provided for fast-track approvals, it was suggested that the draft Guide should raise that issue for consideration. A further suggestion was that a number of the procedural issues set forth in italics on page 44 of document A/CN.9/WG.V/WP.54/Add.1 were issues that could be addressed in the plan to ensure that the procedures to be followed in order to achieve approval and implementation of the plan were clear.

137. It was noted that permitting secured creditor rights to be affected by the plan could have a negative impact upon the availability of credit and that that effect should be clearly stated in the draft Guide.

138. In terms of protection of minority interests, a question was raised as to whether that issue should be addressed in the plan or in the insolvency law. It was suggested that in order to ensure that the proceedings would be respected it was important that the majority creditors should not be able to unfairly affect the rights of the minority.

### (iii) Approval and effect of the plan

139. On the issue of voting on the plan, a view was expressed that in order to encourage cross-border flows of capital clear rules were required as to the rights of the different classes of creditors, particularly with regard to the ability of creditors to vote on a plan and to refuse to agree to a plan. It was suggested that voting should be based only upon economic interest in the outcome of the process and that only those parties having such an interest should be permitted to vote. Support was expressed in favour of voting on the basis of both value of the claims and number of creditors, as well as for the requirement of a supermajority to ensure that the support for the plan was sufficient to ensure its implementation. This was expressed to be particularly important where dissenting creditors could be bound to the plan.

140. With regard to the reasons that creditors could put forward for challenging a plan, it was noted that since all creditors would be prejudiced by the proceedings, a level of prejudice or harm that exceeded the prejudice or harm suffered by other creditors or classes of creditors was required.

141. In terms of dividing creditors into classes and the criteria that should be taken into account, it was suggested that in the absence of a compelling reason for creating special classes, all general unsecured creditors should be treated in one class. It was noted, however, that in one country the law provided criteria for including secured claims in the same class if the interests of the creditors holding those claims were sufficiently similar

to give them a commonality of interest, taking into account factors including: the nature of the debts giving rise to the claims; the nature and priority of the security in respect of the claims; the remedies available to the creditors in the absence of the proposal, and the extent to which the creditors could recover their claims by exercising those remedies; the treatment of the claims under the proposal and the extent to which the claims would be paid under the proposal; and other criteria as may be prescribed.

142. It was suggested that the draft Guide should address the question of what occurred in situations where a plan was not approved and whether that would lead to other parties being able to propose an alternative plan, automatic commencement of liquidation proceedings, individual actions by creditors or some other result. One view was that a result of automatic liquidation might have the effect of discouraging the debtor from proposing a plan, an outcome that directly opposed to one of the key objectives of an insolvency regime. Another view was that allowing individual creditors to take action could result in the race for assets that the commencement of collective proceedings was intended to avoid and was incompatible with the goal of maximization of value. A different view was that once a plan was rejected, anything other than automatic liquidation might simply lead to delay, further diminution of value and no predictable end to the proceedings. Automatic liquidation would provide a procedure for equality of distribution in accordance with the insolvency regime. It was suggested that a compromise might be to allow the proposal of a different plan by creditors within a specified deadline and only in situations where no plan could be prepared should liquidation follow.

143. With respect to the approval procedure, it was noted that not all countries required court confirmation of a plan approved by creditors; some insolvency regimes provided that where the requisite majority of creditors had approved the plan nothing further was required. It was noted also that in some countries the role of the court was performed by an administrative authority. Minority creditors could be protected by allowing them to dispute the plan in court, with some laws establishing criteria against which the dissent of those creditors could be judged.

## **5. Liquidation and distribution**

### *Distribution priorities*

144. A general view was that the draft Guide should recommend that priorities in distribution should be not only clearly identified but also reduced to the minimum possible, with a view to both preserving the predictability and the efficiency of the insolvency system and to fostering the availability of credit. It was pointed out that the greater the number of priorities recognized by the law, the wider the scope of the debates which were likely to arise in assessing the privileges pertaining to the different privileged categories. Nevertheless, it was also suggested that the treatment of priorities should distinguish between those that might arise in respect of secured creditors as a result of a bargain or after commencement (such as would relate to provision of post-commencement finance) and those that were related to general unsecured creditors.

145. The Working Group agreed that the draft Guide should recommend that any priority be specifically mentioned in the insolvency law, irrespective of whether the policy reason underlying that priority was to be found in the insolvency system or in other legislation. It was also agreed that it would be inappropriate for the draft Guide to suggest which priorities should be retained or excluded. It was further agreed that the

financial and economic impact of introducing priorities (namely, the reduction of the amount of the estate available to unsecured debt) should be expressly mentioned.

146. With respect to the provision of a general superpriority, as such prevailing on both secured and unsecured creditors, the view was shared that such a priority would entail a major interference with the rights of secured creditors and therefore needed to be supported by sound public policy considerations.

147. The Working Group discussed the treatment of the expenses incurred during the insolvency proceeding. It was pointed out that most legal systems gave those claims a top priority by considering them to be administrative claims, often resulting in a significant impact on the insolvency estate. While it was recognized that the specific treatment of that issue had links to the underlying infrastructure of the system, various views to the effect of reducing the impact of those claims on the insolvency estate were expressed. The suggestion to introduce a ceiling to the amount of those expenses was not supported. Instead, the prevailing view was that precise, though flexible, criteria supporting allowance of those expenses should be outlined. In particular, it was suggested that their allowance should be conditional upon the utility of the expense for the purpose of increasing the estate in the general interest of all constituents. A similar suggestion was that those expenses should be allowed only when they appeared not only reasonable and necessary, but also consistent with the objectives of the procedure. A further suggestion was that the reasonableness of the expense should be assessed against both the amount of resources available to, and the possible effect on, the procedure.

148. As to the authority that should be entrusted with the task of assessing the appropriateness and reasonableness of the expenditure, one view was that those expenses needed to be subject to prior authorization by the court. According to a similar view, prior authorization by the court should be required in respect of actions falling outside the scope of the ordinary course of business. However, the prevailing view was that that assessment should be made by the creditors, with a view also to ensuring the transparency of the proceeding, provided however that the decision of the creditors would be subject to recourse to court.

149. In response to those suggestions, it was clarified that a distinction should be drawn between the fees of the insolvency representative and of other professionals involved in the procedure, on the one hand, and the expenses incurred for the purposes of operating the business and carrying out the procedure, on the other hand.

150. As a general suggestion, it was noted that the draft Guide should address the treatment of situations where limited or no assets were available. It was observed that different approaches were available: while some systems provided for immediate termination of the procedure upon assessment of absence of assets by the court, others provided that no action should be taken and others for a state liquidator to be appointed. It was suggested that in those cases the fees of the insolvency representative might be paid by way of a deduction on its personal tax account. In response, it was noted that that suggestion would result in the fees of the insolvency representative being borne by the State rather than by the insolvency estate. The view that, when a relevant tax credit was at stake, the tax authorities should be entrusted with the task of administering the insolvency proceeding was equally not supported.

151. As to the order in which issues were dealt with in the draft Guide, it was suggested that administrative claims should be addressed prior to secured creditors, given the

status of priority widely recognized as applicable to those claims. In response, it was observed that some legal systems might take a different view and that therefore the order of the text should not be amended.

152. Another suggestion was that reference to the "owners", as appearing in paragraph 195 of document A/CN.9/WG.V/WP.54/Add.1, be replaced by reference to the "shareholders". In response, it was observed that reference to shareholders would only reflect the situation of a debtor established in the form of a limited liability company and that a broader, more neutral term was needed to encompass all situations of financing granted by insiders.

153. In respect of the privilege granted to employee salaries and benefits, it was observed that providing for a system of social guarantee would result in a benefit for the insolvency estate, since that would allow those claims to be excluded from the distribution of the assets. It was however clarified that that would require that the social institution guaranteeing those claims would not be allowed to have the same priority vis-à-vis the insolvency estate as the employees. Another view was that the draft Guide should draw attention to solutions available in different legal systems.

154. A view was that priority of secured creditors, though established by substantive law, should be mentioned in the section of the insolvency law devoted to priority issues, since that would provide clarification for those legal systems where stability and confidence of the credit industry needed to be enhanced.

155. General support was expressed for the suggestion that the draft Guide should specifically address the issue of the termination of the proceedings, in respect of determining both the time at which it would occur and its effects.

#### **IV. Alternative informal insolvency processes**

156. The Working Group considered document A/CN.9/WG.V/WP.55 and what further work it might undertake in the area of informal insolvency procedures, taking into account the work of other organizations on that topic and international trends in the development of informal procedures that provided alternatives to formal procedures and were particularly useful in international insolvencies.

157. The Working Group generally agreed on the desirability of undertaking work on informal insolvency procedures, noting that while such procedures relied upon the formal insolvency framework they could provide a means of introducing flexibility into insolvency systems, reduce reliance on judicial infrastructure, facilitate an earlier proactive response from creditors than would normally be possible under formal regimes and avoid the stigma that often attached to insolvency. It was noted that the increasing globalization of markets and the growth in debt trading had resulted in a more diverse range of creditors being involved in international reorganizations than previously. Those diverse creditors had different interests and objectives in the insolvency of the debtor, which did not always coincide with the interests and objectives of other major credit providers or support the achievement of reorganization.

158. The Working Group discussed the various forms that those informal proceedings could take. It was pointed out that there was a continuum of processes ranging from

non-binding principles which supported a collective negotiating framework and did not involve the judicial system (although relying on the existence of an efficient and effective formal system for leverage), to those which utilized a judicial administration mechanism to enforce a plan reached by informal negotiations and bind creditors to that plan. It was suggested that where the negotiations took place out of court and the debtor and the majority of creditors agreed to the plan, a fast track mechanism could be used for the approval process.

159. With respect to the completely informal processes, it was suggested that the Working Group should consider the work being undertaken by other organizations, such as the INSOL Lenders Group's Statement of Principles for a global approach to multi-creditor workouts (set forth in document A/CN.9/WG.V/WP.55) and other similar types of guidelines. In regard to those processes that combined informal and formal elements, the Working Group might consider how those processes had been developed around the world and in particular examine the role that was taken by judicial and administrative authorities and the point at which intervention occurred.

160. With regard to administrative frameworks, three types of experience were noted and it was suggested that the draft Guide should consider the relevant examples and the circumstances in which they had proven to be useful and where they might appropriately be used in the future. In particular, it was pointed out that they had been of assistance in situations where the courts were inadequate to deal with the issues or simply overwhelmed by the extent of systemic failure.

161. It was noted that some of those considerations intersected with the Working Group's development of a legislative guide on a formal insolvency regime and consideration would need to be given to how that intersection could be achieved. In particular, it was suggested that the draft Guide should consider the different options, offering a discussion of the advantages and disadvantages of each and indicating how they could be integrated into a reorganization regime. It was noted in that regard that there was a correlation between the degree of financial difficulty being experienced by the debtor and the difficulty of the appropriate solution. Where, for example, a single bank was involved, it was likely that the debtor could negotiate informally with that bank and resolve its difficulties without involving trade creditors. Where the financial situation was more complex and required the involvement of a large number of different types of creditors, a greater degree of formality might be needed. It was suggested that that approach might be a way of presenting the different procedures to legislators. It was agreed that those considerations should be taken into account in the Working Group's consideration of the reorganization sections of the draft Guide, and in particular that the subject of expedited reorganization procedures to implement restructurings of the type addressed in document A/CN.9/WG.V/WP.55 (including both cross-border and domestic arrangements) be addressed in the draft Guide.

**General Assembly**

Distr.: General  
25 October 2001

Original: English

---

**United Nations Commission  
on International Trade Law**

Thirty-fifth session  
New York, 10-28 June 2002

**Report of the Working Group on Privately Financed  
Infrastructure Projects on the work of its fourth session**

**(Vienna, 24-28 September 2001)**

**Contents**

|                                                                                                                                                                        | <i>Paragraphs</i> | <i>Page</i> |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------|-------------|
| I. Introduction .....                                                                                                                                                  | 1-7               | 2           |
| II. Deliberations and decisions .....                                                                                                                                  | 8-9               | 2           |
| III. Possible addendum to the UNCITRAL Legislative Guide on Privately Financed<br>Infrastructure Projects .....                                                        | 10-180            | 2           |
| A. General remarks .....                                                                                                                                               | 10-17             | 2           |
| B. Consideration of topics for possible draft model legislative provisions on the<br>basis of the legislative recommendations contained in the Legislative Guide ..... | 18-174            | 3           |
| C. Relationship between the draft model legislative provisions and the<br>Legislative Guide .....                                                                      | 175-180           | 24          |



## I. Introduction

1. The present report of the United Nations Commission on International Trade Law (UNCITRAL) covers the fourth session of the Working Group on Privately Financed Infrastructure Projects (previously named Working Group on Time-Limits and Limitations (Prescription) in the international sale of goods).

2. The Working Group, which was composed of all States members of the Commission, held its fourth session in Vienna from 24 to 28 September 2001. The session was attended by representatives of the following States members of the Working Group: Austria, Brazil, Cameroon, Canada, China, Colombia, France, Germany, Honduras, Hungary, Iran (Islamic Republic of), Italy, Japan, Morocco, Russian Federation, Spain, Sweden and United States of America.

3. The session was attended by observers from the following States: Bosnia and Herzegovina, Czech Republic, Ecuador, Indonesia, Lebanon, Namibia, Nigeria, Pakistan, Philippines, Portugal, Republic of Korea, Saudi Arabia, Slovakia, Syrian Arab Republic, Turkey and Venezuela.

4. The session was also attended by observers from the following international organizations: United Nations Industrial Development Organization, Organisation for Economic Cooperation and Development and Southeast European Cooperative Initiative.

5. The Working Group elected the following officers:

*Chairman:* Tore Wiwen-Nilsson (Sweden)

*Rapporteur:* Judit Kónia (Hungary)

6. The Working Group had before it the following documents: the provisional agenda (A/CN.9/WG.I/WP.27); the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects, with a view to possible use of the legislative recommendations contained therein as a basis for its deliberations, and the report on the Colloquium on Privately Financed Infrastructure: Legal Framework and Technical Assistance, held in Vienna from 2 to 4 July 2001 (A/CN.9/488; see para. 13 below).

7. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Possible addendum to the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects.
5. Other business.
6. Adoption of the report.

## II. Deliberations and decisions

8. The Working Group started its work on the drafting of core model legislative provisions in the field of privately financed infrastructure projects, pursuant to a decision taken by the Commission at its thirty-fourth session (Vienna, 25 June-13 July 2001).<sup>1</sup>

9. The Secretariat was requested to prepare draft model legislative provisions in the field of privately financed infrastructure projects, based on those deliberations and decisions, to be presented to the fifth session of the Working Group (Vienna, 9-13 September 2002)<sup>2</sup> for review and further discussion.

## III. Possible addendum to the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects

### A. General remarks

10. At its thirty-third session (New York, 12 June-7 July 2000), the Commission adopted the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects, consisting of the legislative recommendations (A/CN.9/471/Add.9), with the amendments adopted by the Commission at that session and the notes to the legislative recommendations (A/CN.9/471/Add.1-8), which the Secretariat was authorized to finalize in the light of the deliberations of the Commission.<sup>3</sup> The Legislative

Guide has since been published in all official languages.

11. At the same session, the Commission also considered a proposal for future work in that area. It was suggested that, although the Legislative Guide would be a useful reference for domestic legislators in establishing a legal framework favourable to private investment in public infrastructure, it would nevertheless be desirable for the Commission to formulate more concrete guidance in the form of model legislative provisions or even in the form of a model law dealing with specific issues.<sup>4</sup>

12. After consideration of that proposal, the Commission decided that the question of the desirability and feasibility of preparing a model law or model legislative provisions on selected issues covered by the Legislative Guide should be considered by the Commission at its thirty-fourth session. In order to assist the Commission in making an informed decision on the matter, the Secretariat was requested to organize a colloquium, in cooperation with other interested international organizations or international financial institutions, to disseminate knowledge about the Legislative Guide.<sup>5</sup>

13. The Colloquium on Privately Financed Infrastructure: Legal Framework and Technical Assistance was organized with the co-sponsorship and organizational assistance of the Public-Private Infrastructure Advisory Facility (PPIAF), a multi-donor technical assistance facility aimed at helping developing countries improve the quality of their infrastructure through private sector involvement. It was held in Vienna from 2 to 4 July 2001.

14. At its thirty-fourth session, the Commission took note with appreciation of the results of the Colloquium as summarized in a note by the Secretariat (A/CN.9/488) and agreed that the proceedings should be published by the United Nations. The Commission further recommended that the Secretariat, in coordination with other organizations, undertake initiatives to ensure widespread knowledge of the Legislative Guide.

15. Various views were expressed as to the desirability and feasibility of further work of the Commission in the field of privately financed infrastructure projects.

16. There was wide support for the view that there was a significant demand for model legislation providing for more specific guidance, especially in developing countries and in countries with economies in transition. In that connection, it was suggested that the Legislative Guide should be implemented by way of drafting a set of core model provisions dealing with some of the substantive issues identified and dealt with in the Guide. It was pointed out that, while the Guide was in itself a valuable product to assist domestic legislators in the process of enacting or reviewing legislation in that field, the effectiveness of that process would be significantly increased if model legislative provisions were available. It was also noted that the prompt undertaking of such further work would take advantage of the vast and significant expertise gathered throughout the process that led to the adoption of the Guide and would allow it to be easily and effectively achieved within a reasonable amount of time. Finally, it was further observed that there was no inconsistency between undertaking such further work, on the one hand, and undertaking efforts to promote knowledge and dissemination of the Legislative Guide, on the other.

17. After considering the different views that were expressed, the Commission agreed that a working group should be entrusted with the task of drafting core model legislative provisions in the field of privately financed infrastructure projects. The Commission was of the view that, if further work in the field of privately financed infrastructure projects was to be accomplished within reasonable time, it was essential to carve out a specific area from among the many issues dealt with in the Legislative Guide. Accordingly, it was agreed that the first session of such a working group should identify the specific issues on which model legislative provisions, possibly to become an addendum to the Legislative Guide, could be formulated.<sup>6</sup>

## **B. Consideration of topics for possible draft model legislative provisions on the basis of the legislative recommendations contained in the Legislative Guide**

18. The Working Group noted that the purpose of its work was to review the legislative recommendations

contained in the Legislative Guide with a view to formulating more concrete guidance in the form of model legislative provisions dealing with specific issues, with a possible further focus on chapter III, "Selection of the concessionaire". The first task of the Working Group was therefore to identify the issues on which such guidance might be useful.

19. The Working Group heard various suggestions of topics that might usefully be addressed in model legislative provisions, including the following: the authority to award concessions in the host country; the nature of the concession (i.e. whether exclusive or not) and its duration; measures to ensure effective administrative coordination among the various governmental agencies involved; procedures to select the concessionaire; authority to provide governmental support or guarantees to the project; key provisions dealing with the construction and the operational phases of the project; provisions intended to remove statutory obstacles to the implementation of privately financed infrastructure projects; provisions aimed at facilitating the financing of infrastructure projects; dispute settlement mechanisms for the various phases of the project; governing law of the project agreement, including the issue of which branch of the laws of the host country should govern the agreement (i.e. whether administrative law or general contract law); and duration, extension and termination of the project agreement, including compensation arrangements.

20. It was suggested that, when considering topics on which model legislative provisions should be drafted, the Working Group should not aim at formulating provisions that prescribed the contents of the project agreement. Rather, the Working Group should have as its primary objective the formulation of model legislative provisions that enabled the use of private financing for infrastructure development without being overly prescriptive in respect of the contractual arrangements between the various parties concerned.

21. The Working Group welcomed those suggestions and observations. Generally, it was pointed out that most of those topics were already covered in the Legislative Guide. The Working Group agreed that it should use the legislative recommendations as the basis for its deliberations. It also agreed that it should begin its work by the legislative recommendations dealing with the selection of the concessionaire and

revert thereafter to the other topics covered in the Guide.

### ***Chapter III. Selection of the concessionaire***

#### **General considerations**

##### *Recommendation 14*

22. The text of the recommendation was as follows:

"The law should provide for the selection of the concessionaire through transparent and efficient competitive procedures adapted to the particular needs of privately financed infrastructure projects."

23. The Working Group agreed that it would be useful to formulate a model legislative provision that stated the general principles that should preside over the process leading to the selection of the concessionaire. Whether a substantive provision was needed in that regard, or whether that idea should be expressed in a preambular paragraph to the model legislative provision, was a question to which the Working Group decided to revert at a later stage, once an initial draft had been prepared by the Secretariat.

24. By way of a general comment, it was pointed out that chapter III of the Legislative Guide contained an extensive set of legislative recommendations and detailed notes thereon. In that connection, the question was raised as to whether it was recommended that the host country adopt specific legislation dealing with the procedures for selecting the concessionaire and, if so, how such provisions would relate to general legislation on government procurement.

25. In response, it was noted that the purpose of the legislative recommendations was to assist the host country in developing rules specially suited for the selection of the concessionaire. The recommendations were concerned with the particular needs of privately financed infrastructure projects and differed in many respects from general rules on government procurement, such as those contained in the UNCITRAL Model Law on Procurement of Goods, Construction and Services ("the UNCITRAL Model Procurement Law"). The legislative recommendations were not intended to replace or reproduce such general

rules on government procurement, and it was for each host country to decide in which manner they could best be implemented. For example, a State might wish to enact special legislation or regulations dealing only with the selection of the concessionaire, or might incorporate some of them into general legislation on privately financed infrastructure projects, with cross-references, as appropriate, to other legislation dealing with matters not covered in the recommendations (such as administrative and practical arrangements for conducting the selection proceedings).

26. In that connection, it was suggested that the Working Group might need to consider carefully the relationship between model provisions on selection procedures and the general procurement regime in the host country. It was also pointed out that two aspects should be borne in mind by the Working Group.

27. The first was that recommendation 14 was based on the assumption that there existed in the host country a general framework for government procurement that provided for transparent and efficient competitive procedures in a manner that met the standards set forth in the UNCITRAL Model Procurement Law. The Working Group was invited to consider in due course how the model legislative provisions to be drafted should address the needs of countries that lacked such a general framework.

28. The second aspect to which the attention of the Working Group was drawn concerned the particular requirements of the selection procedures for privately financed infrastructure projects. It was pointed out that international experience had revealed some limitations of traditional forms of competitive selection procedures, such as the tendering method, when applied for the award of privately financed infrastructure projects. The model legislative provisions to be developed by the Working Group should make clear the particular nature of the selection procedures to be dealt with by them.

### **Pre-selection of bidders**

29. The text of the relevant recommendations was as follows:

#### *Recommendation 15*

"The bidders should demonstrate that they meet the pre-selection criteria that the contracting authority considers appropriate for the particular project, including:

"(a) Adequate professional and technical qualifications, human resources, equipment and other physical facilities as necessary to carry out all the phases of the project, namely, engineering, construction, operation and maintenance;

"(b) Sufficient ability to manage the financial aspects of the project and capability to sustain the financing requirements for the engineering, construction and operational phases of the project;

"(c) Appropriate managerial and organizational capability, reliability and experience, including previous experience in operating public infrastructure."

#### *Recommendation 16*

"The bidders should be allowed to form consortia to submit proposals, provided that each member of a pre-selected consortium may participate, either directly or through subsidiary companies, in only one bidding consortium."

#### *Recommendation 17*

"The contracting authority should draw up a short list of the pre-selected bidders that will subsequently be invited to submit proposals upon completion of the pre-selection phase."

30. The Secretariat was requested to draft a model provision reflecting the substance of recommendation 15.

31. In respect of both recommendations 16 and 17, one view was that they contained provisions of an operational nature, as such not requiring to be addressed in the form of model legislative provisions.

32. In response, it was observed that pre-selection was a crucial phase within the context of selection of the concessionaire for privately financed infrastructure projects and that, accordingly, model legislative provisions relating thereto should be drafted. As a general remark, it was pointed out that the Working

Group should aim at drafting a comprehensive text on the selection process, capable of being used by legislators and government officers as a self-standing, self-sufficient tool for the purpose of enacting new or revising existing legislation in the area of privately financed infrastructure. Accordingly, it was agreed that any and all provisions that were felt to be critical to achieving the goals of privately financed infrastructure projects should be included in the draft text. At the same time, however, the Working Group agreed that the model legislative provisions should refrain from addressing unnecessary details that might impair the flexibility of the text.

33. In respect of recommendation 16, the view was expressed that the issue of submission of proposals by consortia could not be addressed by a single provision, since distinctions had to be drawn depending upon the kind of project at stake. It was clarified that, in the event that model legislative provisions were to be retained, they had to be drafted bearing in mind the general situation of privately financed infrastructure projects, consistent with the approach taken in the Legislative Guide.

34. In respect of recommendation 17, the suggestion to provide for the short list of pre-selected bidders to be published and notified to all parties having submitted an application for the purposes of pre-qualification was widely supported. The view was shared that such publication would enhance the transparency of the process, without prejudice however to the power of the enacting countries to address the issue of publication in the law rather than in regulations. It was recalled that notification of all parties having submitted an application to pre-qualify was also provided by article 7, paragraph 6, of the UNCITRAL Model Procurement Law.

## Procedures for requesting proposals

### Single-stage and two-stage procedures for requesting proposals

#### *Recommendation 18*

35. The text of the recommendation was as follows:

"Upon completion of the pre-selection proceedings, the contracting authority should

request the pre-selected bidders to submit final proposals."

36. The Secretariat was requested to draft a model provision reflecting the substance of the legislative recommendation.

#### *Recommendation 19*

37. The text of the recommendation was as follows:

"Notwithstanding the above, the contracting authority may use a two-stage procedure to request proposals from pre-selected bidders where it is not feasible for it to formulate project specifications or performance indicators and contractual terms in a manner sufficiently detailed and precise to permit final proposals to be formulated. Where a two-stage procedure is used, the following provisions should apply:

(a) The contracting authority should first call upon the pre-selected bidders to submit proposals relating to output specifications and other characteristics of the project as well as to the proposed contractual terms;

(b) The contracting authority may then convene a meeting of bidders to clarify questions concerning the initial request for proposals;

(c) Following examination of the proposals received, the contracting authority may review and, as appropriate, revise the initial project specifications and contractual terms prior to issuing a final request for proposals."

38. The Secretariat was requested to draft a model provision reflecting the substance of the legislative recommendation.

### Content of the final request for proposals

#### *Recommendation 20*

39. The text of the recommendation was as follows:

"The final request for proposals should include at least the following:

"(a) General information as may be required by the bidders in order to prepare and submit their proposals;

"(b) Project specifications and performance indicators, as appropriate, including

contracting authority's requirements regarding safety and security standards and environmental protection;

"(c) The contractual terms proposed by the contracting authority;

"(d) The criteria for evaluating the proposals, the relative weight to be accorded to each such criterion and the manner in which the criteria are to be applied in the evaluation of proposals."

40. It was observed that it was crucial to provide for the contractual terms proposed by the contracting authority to be included in the final request for proposal, as provided by recommendation 20, paragraph c, and that therefore a model provision reflecting that recommendation should be drafted.

#### **Clarifications and modifications**

##### *Recommendation 21*

41. The text of the recommendation was as follows:

"The contracting authority may, whether on its own initiative or as a result of a request for clarification by a bidder, modify the final request for proposals by issuing addenda at a reasonable time prior to the deadline for submission of proposals."

42. The Secretariat was requested to draft a model provision reflecting the substance of the legislative recommendation.

#### **Evaluation criteria**

##### *Recommendation 22*

43. The text of the recommendation was as follows:

"The criteria for the evaluation and comparison of the technical proposals should concern the effectiveness of the proposal submitted by the bidder in meeting the needs of the contracting authority, including the following:

"(a) Technical soundness;

"(b) Operational feasibility;

"(c) Quality of services and measures to ensure their continuity;

"(d) Social and economic development potential offered by the proposals."

##### *Recommendation 23*

44. The text of the recommendation was as follows:

"The criteria for the evaluation and comparison of the financial and commercial proposals may include, as appropriate:

"(a) The present value of the proposed tolls, fees, unit prices and other charges over the concession period;

"(b) The present value of the proposed direct payments by the contracting authority, if any;

"(c) The costs for design and construction activities, annual operation and maintenance costs, present value of capital costs and operating and maintenance costs;

"(d) The extent of financial support, if any, expected from the Government;

"(e) Soundness of the proposed financial arrangements;

"(f) The extent of acceptance of the proposed contractual terms."

45. The Working Group discussed the issue of the relationship between the evaluation criteria referring to non-financial aspects, as listed in recommendation 22, and the criteria relating to the financial aspects, as listed in recommendation 23.

46. It was felt that the model legislative provisions should recommend avoiding placing excessive emphasis on the financial aspects of a proposal, namely on the price criterion, to the detriment of non-financial aspects, which was felt inappropriate in respect of privately financed infrastructure projects. A similar view was that the model legislative provisions should clarify that price-related criteria could be taken into account only after evaluation of the non-financial aspects of the proposals had been carried out.

47. In response, it was noted that the issue of the relative weight to be given to financial criteria vis-à-vis non-financial aspects had been thoroughly addressed in the notes to the Legislative Guide. It was further noted that it would be inappropriate to address

the issue of hierarchy among evaluation criteria at the legislative level. In that connection, it was also recalled that the mandate given to the Working Group was meant to comply with and not to amend the policy decisions underlying the Guide.

48. The concern was raised that departure from the price criterion might result in the overall transparency of the process being impaired. It was suggested that the draft model legislative provisions should provide for parameters capable of ensuring the objectiveness of the procedure. In that connection, it was observed that such problems of transparency and objectiveness might be addressed by the thresholds established by the contracting authority for the purpose of assessing the qualification and the responsiveness of the proposals, as provided in recommendation 24. It was further noted that such thresholds should be established by the contracting authority with a view to ensuring the viability of the project. Another suggestion was that the thresholds established for the purposes of assessing the responsiveness of the proposals should be included in the final request for proposals addressed in recommendation 20.

49. After discussion, the Working Group agreed that the issue of determining the relative weight to be given to the evaluation criteria should be left to the contracting authority, provided however that adequate transparency was ensured. However, it was further agreed that the model legislative provisions might usefully refer to the possibility for the contracting authority to structure the evaluation process in two stages, along the lines of article 42 of the UNCITRAL Model Procurement Law and as reflected in paragraph 81 of the notes to the Legislative Guide.

50. The suggestion that environmental soundness, though possibly implied in the criteria of "technical soundness" and "quality of services", should be mentioned explicitly among the relevant non-financial evaluation criteria received support.

51. In response to a query as to the relationship between subparagraph (f) of recommendation 23 and recommendation 21, providing for the contracting authority being able to provide clarifications and modifications to the final request for proposals, it was explained that subparagraph (f) was only concerned with contractual terms that had not been qualified as non-negotiable by the contracting authority, in respect of which negotiations were allowed. With a view to

enhancing transparency, it was agreed that the point be clearly spelled out in the model legislative provisions.

### **Submission, opening, comparison and evaluation of proposals**

#### *Recommendation 24*

52. The text of the recommendation was as follows:

"The contracting authority may establish thresholds with respect to quality, technical, financial and commercial aspects to be reflected in the proposals in accordance with the criteria as set out in the request for proposals. Proposals that fail to achieve the thresholds should be regarded as non-responsive."

53. Subject to the suggestion made in respect of recommendation 23, subparagraph f, the Secretariat was requested to draft a model provision reflecting the substance of the legislative recommendation.

#### *Recommendation 25*

54. The text of the recommendation was as follows:

"Whether or not it has followed a pre-selection process, the contracting authority may retain the right to require the bidders to demonstrate their qualifications again in accordance with criteria and procedures set forth in the request for proposals or the pre-selection documents, as appropriate. Where a pre-selection process has been followed, the criteria should be the same as those used in the pre-selection proceedings."

55. The Secretariat was requested to draft a model provision reflecting the substance of the legislative recommendation.

### **Final negotiations and project award**

#### *Recommendation 26*

56. The text of the recommendation was as follows:

"The contracting authority should rank all responsive proposals on the basis of the evaluation criteria set forth in the request for proposals and invite for final negotiation of the project agreement the bidder that has attained the best rating. Final negotiations may not concern

those terms of the contract which were stated as non-negotiable in the final request for proposals."

57. The Secretariat was requested to draft a model provision reflecting the substance of the legislative recommendation.

#### *Recommendation 27*

58. The text of the recommendation was as follows:

"If it becomes apparent to the contracting authority that the negotiations with the bidder invited will not result in a project agreement, the contracting authority should inform that bidder that it is terminating the negotiations and then invite for negotiations the other bidders on the basis of their ranking until it arrives at a project agreement or rejects all remaining proposals."

59. The Secretariat was requested to draft a model provision reflecting the substance of the legislative recommendation. For the purposes of transparency, however, it was suggested that the circumstances under which the contracting authority might consider it "apparent" that negotiations with the perspective bidder would not result in entering into the agreement should be identified explicitly.

### **Concession award without competitive procedures**

#### *Recommendation 28*

60. The text of the recommendation was as follows:

"The law should set forth the exceptional circumstances under which the contracting authority may be authorized to award a concession without using competitive procedures, such as:

"(a) When there is an urgent need for ensuring continuity in the provision of the service and engaging in a competitive selection procedure would therefore be impractical;

"(b) In case of projects of short duration and with an anticipated initial investment value not exceeding a specified low amount;

"(c) Reasons of national defence or national security;

"(d) Cases where there is only one source capable of providing the required service (for example, because it requires the use of patented technology or unique know-how);

"(e) In case of unsolicited proposals of the type referred to in legislative recommendations 34 and 35;

"(f) When an invitation to the pre-selection proceedings or a request for proposals has been issued but no applications or proposals were submitted or all proposals failed to meet the evaluation criteria set forth in the request for proposals, and if, in the judgement of the contracting authority, issuing a new request for proposals would be unlikely to result in a project award;

"(g) Other cases where the higher authority authorizes such an exception for compelling reasons of public interest."

61. As a general comment, it was noted that in some countries concessions were not always awarded through structured competitive procedures. Coupled with measures enhancing transparency, the less formal procedures used in those countries produced satisfactory results, a circumstance that was adequately reflected in the notes to legislative recommendation 28. It was therefore suggested that the word "exceptional" should not appear in a model provision to implement recommendation 28.

62. There was strong objection to that proposal, since the prevailing view within the Working Group was that the text of recommendation 28 correctly reflected the policy guidance adopted by the Commission that, in the context of privately financed infrastructure projects, the award of a concession without structured competitive procedures should be used in exceptional circumstances.

63. The Working Group was reminded of the Commission's understanding that the list of exceptional circumstances authorizing the award of a concession without structured competitive procedures was not exhaustive.<sup>7</sup> The Working Group was of the view, however, that the flexibility intended by the Commission was already contained in subparagraph (g) of the recommendation and that, as a matter of drafting technique, the words "such as" should not appear in a model provision to implement

recommendation 28. The Working Group agreed to consider expanding the scope of subparagraph (g) by adding language along the following lines "or other cases of the same exceptional nature, as defined by the law".

64. The Working Group agreed that the words "urgent" in subparagraph (a) and "compelling" in subparagraph (g) might not be needed in a model provision to implement recommendation 28.

#### *Recommendation 29*

65. The text of the recommendation was as follows:

"The law may require that the following procedures be observed for the award of a concession without competitive procedures:

"(a) The contracting authority should publish a notice of its intention to award a concession for the implementation of the proposed project and should engage in negotiations with as many companies judged capable of carrying out the project as circumstances permit;

"(b) Offers should be evaluated and ranked according to the evaluation criteria established by the contracting authority;

"(c) Except for the situation referred to in recommendation 28 (c), the contracting authority should cause a notice of the concession award to be published, disclosing the specific circumstances and reasons for the award of the concession without competitive procedures."

66. The Secretariat was requested to draft a model provision reflecting the substance of the legislative recommendation.

67. The Working Group also agreed that it might be useful to expand the scope of subparagraph (c) so as to align the publicity requirements contained therein with the record-keeping requirements referred to in paragraph 122 of chapter III of the Legislative Guide.

### **Unsolicited proposals**

68. There was general agreement within the Working Group that it would be useful to provide specific legislative guidance, in the form of model

legislative provisions, on the manner in which contracting authorities might handle unsolicited proposals. It was pointed out, in that connection, that whether or not such proposals might give rise to some objections of principle, it would be preferable to offer enacting States a satisfactory system to ensure transparency and fairness in handling unsolicited proposals, rather than simply to ignore them altogether.

69. As a general remark, it was observed that it might be useful for the Working Group to define more clearly the notion of unsolicited proposals. It was also suggested that the Working Group should point out, possibly in notes that might accompany the model legislative provisions, that appropriate administrative procedures should be developed by the contracting authority in order to ensure efficiency and transparency in handling unsolicited proposals.

#### *Recommendation 30*

70. The text of the recommendation was as follows:

"By way of exception to the selection procedures described in legislative recommendations 14-27, the contracting authority may be authorized to handle unsolicited proposals pursuant to specific procedures established by the law for handling unsolicited proposals, provided that such proposals do not relate to a project for which selection procedures have been initiated or announced by the contracting authority."

71. The Secretariat was requested to draft a model provision reflecting the substance of the legislative recommendation.

### **Procedures for determining the admissibility of unsolicited proposals**

#### *Recommendation 31*

72. The text of the recommendation was as follows:

"Following receipt and preliminary examination of an unsolicited proposal, the contracting authority should inform the proponent, within a reasonably short period, whether or not there is a potential public interest in the project. If the project is found to be in the public interest, the contracting authority should invite the proponent to submit a formal proposal

in sufficient detail to allow the contracting authority to make a proper evaluation of the concept or technology and determine whether the proposal meets the conditions set forth in the law and is likely to be successfully implemented at the scale of the proposed project."

73. The Secretariat was requested to draft a model provision reflecting the substance of the legislative recommendation.

#### *Recommendation 32*

74. The text of the recommendation was as follows:

"The proponent should retain title to all documents submitted throughout the procedure and those documents should be returned to it in the event that the proposal is rejected."

75. The Secretariat was requested to draft a model provision reflecting the substance of the legislative recommendation.

#### **Procedures for handling unsolicited proposals that do not involve proprietary concepts or technology**

##### *Recommendation 33*

76. The text of the recommendation was as follows:

"The contracting authority should initiate competitive selection procedures under recommendations 14-27 above if it is found that the envisaged output of the project can be achieved without the use of a process, design, methodology or engineering concept for which the author of the unsolicited proposal possesses exclusive rights or if the proposed concept or technology is not truly unique or new. The author of the unsolicited proposal should be invited to participate in such proceedings and may be given a premium for submitting the proposal."

77. The Secretariat was requested to draft a model provision reflecting the substance of the legislative recommendation. It was pointed out, however, that the notion of "premium" in the recommendation might need to be clarified by the Working Group at a later stage.

#### **Procedures for handling unsolicited proposals involving proprietary concepts or technology**

##### *Recommendation 34*

78. The text of the recommendation was as follows:

"If it appears that the envisaged output of the project cannot be achieved without using a process, design, methodology or engineering concept for which the author of the unsolicited proposal possesses exclusive rights, the contracting authority should seek to obtain elements of comparison for the unsolicited proposal. For that purpose, the contracting authority should publish a description of the essential output elements of the proposal with an invitation for other interested parties to submit alternative or comparable proposals within a certain reasonable period."

79. The Secretariat was requested to draft a model provision reflecting the substance of the legislative recommendation.

##### *Recommendation 35*

80. The text of the recommendation was as follows:

"The contracting authority may engage in negotiations with the author of the unsolicited proposal if no alternative proposals are received, subject to approval by a higher authority. If alternative proposals are submitted, the contracting authority should invite all the proponents to negotiations in accordance with the provisions of legislative recommendation 29 (a)-(c)."

81. The Secretariat was requested to draft a model provision reflecting the substance of the legislative recommendation.

#### **Confidentiality**

##### *Recommendation 36*

82. The text of the recommendation was as follows:

"Negotiations between the contracting authority and bidders should be confidential and one party to the negotiations should not reveal to any other person any technical, price or other commercial information relating to the

negotiations without the consent of the other party.”

83. The Secretariat was requested to draft a model provision reflecting the substance of the legislative recommendation.

### **Notice of project award**

#### *Recommendation 37*

84. The text of the recommendation was as follows:

“The contracting authority should cause a notice of the award of the project to be published. The notice should identify the concessionaire and include a summary of the essential terms of the project agreement.”

85. The Secretariat was requested to draft a model provision reflecting the substance of the legislative recommendation.

### **Record of selection and award proceedings**

#### *Recommendation 38*

86. The text of the recommendation was as follows:

“The contracting authority should keep an appropriate record of key information pertaining to the selection and award proceedings. The law should set forth the requirements for public access.”

87. The Secretariat was requested to draft a model provision reflecting the substance of the legislative recommendation.

### **Review procedures**

#### *Recommendation 39*

88. The text of the recommendation was as follows:

“Bidders who claim to have suffered, or who may suffer, loss or injury owing to a breach of a duty imposed on the contracting authority by the law may seek review of the contracting authority’s acts in accordance with the laws of the host country.”

89. The Secretariat was requested to draft a model provision reflecting the substance of the legislative recommendation. It was observed, in that connection, that the Working Group should, at a later stage, consider whether such model provision should appear after the provisions dealing with the selection of the concessionaire or whether it should be best placed together with the provisions dealing with settlement of disputes in the various phases of an infrastructure project.

## ***Chapter I. General legislative and institutional framework***

### **Constitutional, legislative and institutional framework**

#### *Recommendation 1*

90. The text of the recommendation was as follows:

“The constitutional, legislative and institutional framework for the implementation of privately financed infrastructure projects should ensure transparency, fairness, and the long-term sustainability of projects. Undesirable restrictions on private sector participation in infrastructure development and operation should be eliminated.”

91. The Working Group acknowledged that both provisions contained in recommendation 1 were of a general nature and as such were not suitable for translation into legislative language. However, it was agreed that the substance of the recommendation might usefully be retained as a reminder of the broad objectives to be pursued in the field of privately financed infrastructure, possibly in a preamble or in explanatory notes to the model legislative provisions that the Working Group might decide to prepare.

### **Scope of authority to award concessions**

92. The text of the relevant recommendations was as follows:

#### *Recommendation 2*

“The law should identify the public authorities of the host country (including, as appropriate, national, provincial and local

authorities) that are empowered to award concessions and enter into agreements for the implementation of privately financed infrastructure projects."

#### *Recommendation 3*

"Privately financed infrastructure projects may include concessions for the construction and operation of new infrastructure facilities and systems or the maintenance, modernization, expansion and operation of existing infrastructure facilities and systems."

#### *Recommendation 4*

"The law should identify the sectors or types of infrastructure in respect of which concessions may be granted."

#### *Recommendation 5*

"The law should specify the extent to which a concession might extend to the entire region under the jurisdiction of the respective contracting authority, to a geographical subdivision thereof or to a discrete project, and whether it might be awarded with or without exclusivity, as appropriate, in accordance with rules and principles of law, statutory provisions, regulations and policies applying to the sector concerned. Contracting authorities might be jointly empowered to award concessions beyond a single jurisdiction."

93. The Working Group considered recommendations 2-5, on the scope of authority to award concessions, as a unitary set. As a general remark, it was recalled that all those recommendations served the purpose of recommending legislative clarity both as to the identification of the authorities empowered to award concession agreements and as to the scope of such powers. Accordingly, support was expressed for the view that all the aspects addressed in recommendations 2-5 might be reflected and dealt with in a single model legislative provision.

94. As to the technique in which the identification of the relevant authorities should be made, it was suggested that alternative solutions could be proposed, possibly along the lines of the options provided in article 2, paragraph (b), of the UNCITRAL Model

Procurement Law. It was clarified, however, that providing for an exhaustive list of the single relevant bodies or agencies might make it necessary for the law to specify also the sectors in respect of which those bodies or agencies were empowered. Without prejudice to the solution to be given to that issue, the Working Group agreed that the model legislative provisions should have a general scope and not be limited to specific sectors. In that connection, it was also felt that a general definition as to the types of infrastructure projects falling within the scope of those provisions, along the lines of recommendation 3, could be usefully retained.

95. Support was expressed for the view that the issue of possible overlapping of competencies and authorities in respect of privately financed infrastructure projects, depending on the structure of the enacting State or on the nature of the service at stake, should be expressly addressed in a model legislative provision, with a view to ensuring coordination.

96. After discussion, the Working Group requested the Secretariat to draft a model legislative provision addressing that issue, without however delving into excessive details that might result in unnecessary complication of the text. In that connection, it was clarified that the task of providing details as to the structure of the enacting State should be left to national legislators.

### **Administrative coordination**

#### *Recommendation 6*

97. The text of the recommendation was as follows:

"Institutional mechanisms should be established to coordinate the activities of the public authorities responsible for issuing approvals, licences, permits or authorizations required for the implementation of privately financed infrastructure projects in accordance with statutory or regulatory provisions on the construction and operation of infrastructure facilities of the type concerned."

98. While recalling that the recommendation had been considered crucial to avoid delays and inefficiencies related to lack of coordination among

different public authorities, it was felt that the issue did not necessarily lend itself to be dealt with in legislation. In that connection, it was observed that many countries considered such coordination as a matter of administrative practice.

99. Another view was that the issue of coordination among authorities was crucial in order to ensure the long-term sustainability of infrastructure projects and that, accordingly, it should be reflected in a provision of a legislative nature. Some support was expressed for the suggestion that the policy underlying the recommendation be retained in the preamble or the notes to the model legislative provisions, as an issue of a general nature. A further suggestion was that the issue should be dealt with within the context of scope of authority.

100. As a general remark, the Working Group agreed that the issue of determining how to reflect principles that, though important, were not felt suitable to be addressed in model legislative provisions should be deferred to a later stage.

### **Authority to regulate infrastructure services**

101. The text of the relevant recommendations was as follows:

#### *Recommendation 7*

"The authority to regulate infrastructure services should not be entrusted to entities that directly or indirectly provide infrastructure services."

#### *Recommendation 8*

"Regulatory competence should be entrusted to functionally independent bodies with a level of autonomy sufficient to ensure that their decisions are taken without political interference or inappropriate pressures from infrastructure operators and public service providers."

#### *Recommendation 9*

"The rules governing regulatory procedures should be made public. Regulatory decisions should state the reasons on which they are based

and should be accessible to interested parties through publication or other means."

#### *Recommendation 10*

"The law should establish transparent procedures whereby the concessionaire may request a review of regulatory decisions by an independent and impartial body, which may include court review, and should set forth the grounds on which such a review may be based."

#### *Recommendation 11*

"Where appropriate, special procedures should be established for handling disputes among public service providers concerning alleged violations of laws and regulations governing the relevant sector."

102. The general view was that recommendations 7-11 were not suitable to be translated into legislative language and that, accordingly, the authority to regulate infrastructure services should remain outside the scope of the model legislative provisions. In that connection, it was pointed out that some issues pertaining to the regulatory authority might be usefully dealt with within the context of other chapters, such as those addressing the operation phase or the settlement of disputes.

## **Chapter II. Project risks and government support**

### **Project risks and risk allocation**

#### *Recommendation 12*

103. The text of the recommendation was as follows:

"No unnecessary statutory or regulatory limitations should be placed upon the contracting authority's ability to agree on an allocation of risks that is suited to the needs of the project."

104. While reaffirming its importance for the purpose of making legislators aware of the implications of their policy choices in the field of privately financed infrastructure, the Working Group agreed that the recommendation had an educational rather than a prescriptive character and therefore was not suitable to be transformed into a model legislative provision.

## Government support

### *Recommendation 13*

105. The text of the recommendation was as follows:

"The law should clearly state which public authorities of the host country may provide financial or economic support to the implementation of privately financed infrastructure projects and which types of support they are authorized to provide."

106. One view was that the recommendation was related to the broader issue of the scope of authority to award concessions. Accordingly, it was suggested that its substance should be included in the model legislative provisions related to legislative recommendations 2-5. While that view attracted some support, a concern was that mentioning governmental financial or economic support in a model legislative provision would be tantamount to recommending that support be given by the Government, a result that was considered inappropriate in respect of those Governments whose policy was not to grant any support for privately financed infrastructure projects. In response, it was observed that the purpose of a provision reflecting the substance of recommendation 13 would not consist in recommending government support to be granted as a policy approach, but rather in ensuring transparency in those systems where a policy decision in favour of such support had been taken.

107. In respect of the last part of the recommendation, suggesting that the law should clearly state the types of support that could be provided by the public authorities, it was feared that its incorporation in a model legislative provision might result in unnecessarily diminishing flexibility in negotiations. A further concern was that the task of drafting a comprehensive list might prove difficult, owing to the variety of forms that such support could take.

108. After discussion, the Working Group requested the Secretariat to draft a model provision reflecting the substance of the recommendation, possibly in square brackets, with a view to drawing the attention of the Group to the need to reconsider the issue at a later stage.

## ***Chapter IV. Construction and operation of infrastructure: legislative framework and project agreement***

### **General provisions on the project agreement**

#### *Recommendation 40*

109. The text of the recommendation was as follows:

"The law might identify the core terms to be provided in the project agreement, which may include those terms referred to in recommendations 41-68 below."

110. The Working Group noted that, as pointed out in the Legislative Guide (chap. IV, "Construction and operation of infrastructure: legislative framework and project agreement", para. 2), domestic legislation often contained provisions dealing with the content of the project agreement. In some countries, the law merely referred to the need for an agreement between the concessionaire and the contracting authority, while the laws of other countries contained extensive mandatory provisions concerning the content of clauses to be included in the agreement. An intermediate approach was taken by those laws which listed a number of issues that need to be addressed in the project agreement without regulating in detail the content of its clauses.

111. The Working Group was mindful of the fact that general legislative provisions on certain essential elements of the project agreement might serve the purpose of establishing a general framework for the allocation of rights and obligations between the parties. They might also be intended to ensure consistency in the treatment of certain contractual issues and to provide guidance to the public authorities involved in the negotiation of project agreements at different levels of government (national, provincial or local). Lastly, legislation might sometimes be required so as to provide the contracting authority with the power to agree on certain types of provisions.

112. However, the Working Group was of the view that general legislative provisions dealing in detail with the rights and obligations of the parties might deprive the contracting authority and the concessionaire of the necessary flexibility to negotiate an agreement that

took into account the needs and particularities of a specific project.

113. Against that background, the Working Group held an extensive exchange of views on whether it would be desirable to formulate a model legislative provision that listed essential issues that needed to be addressed in the project agreement. It was proposed, in that connection, that such a list be based upon the headings that preceded recommendations 41-68, with some adjustments where it was felt that the language used in the headings did not provide a sufficiently clear indication of the subject matter to be dealt with in the project agreement. The Working Group was also reminded of the possible disadvantages of drafting such a list of essential provisions. It was said, for instance, that such a list would give rise to the question as to whether the parties had the power not to include any of the matters listed or whether they might, in turn, include other matters not contained in the list. Another possible disadvantage might be uncertainty as to what might be the legal consequences of failure by the parties to follow a list of provisions established in legislation.

114. Having considered the various views that were expressed, the Working Group agreed that it would be useful to formulate a model legislative provision that listed essential issues that needed to be addressed in the project agreement. The Secretariat was requested to prepare an initial draft of such model provision on the basis of the headings that preceded recommendations 41-68, with the adjustments that might be required so as to spell out clearly, but without unnecessary details, the various topics that needed to be covered by project agreements.

115. The Working Group proceeded to consider the suggestion that, in addition to the list of core provisions of the project agreement, some of the matters dealt with in recommendations 41-68 related to issues that deserved to be treated separately in specific model legislative provisions. This, it was said, was the case, in particular, of those recommendations which related to matters for which prior legislative authorization might be needed or those which might affect the interests of third parties or provisions relating to essential policy matters on which variation by agreement was not admitted in some legal systems.

116. While there were no objections in principle to that proposal, the Working Group decided to revert to

it at a later stage once it had completed its review of legislative recommendations 41-68 (see paras. 118-165 below).

#### *Recommendation 41*

117. The text of the recommendation was as follows:

"Unless otherwise provided, the project agreement is governed by the law of the host country."

118. In response to a question as to the meaning of the opening phrase of the recommendation, it was pointed out that the issue of the law governing the project agreement had been the subject of extensive debate at the thirty-second session of the Commission. The flexible wording eventually agreed upon by the Commission was intended to take into account the fact that, under some legal systems, provisions allowing for the application of a law other than the law of the host country could only be of a statutory nature, whereas in other legal systems the contracting authority might have the power to agree on the applicable law.

119. It was further stated that beyond the question of the choice between domestic or foreign law, the recommendation also related to the issue of which branch of the laws of the host country would govern the project agreement (i.e. whether administrative law or general contract law). That question, it was pointed out, had significant practical implications, since administrative law in some legal systems provided for a number of implied or explicit prerogatives of governmental agencies in connection with administrative contracts, such as powers to terminate a contract unilaterally or to amend its terms.

120. It was suggested that legislative recommendation 41 did not lend itself to being transformed into a self-standing model legislative provision. At the most, it was said, the Working Group might wish to consider, at an appropriate stage, including a heading such as "governing law" in a list of core provisions of a project agreement that might be drafted to implement legislative recommendation 40.

121. The countervailing view, however, was that recommendation 41 was important, since it touched upon the sovereignty of host countries. While in practice investors, in particular foreign ones, might have concerns about the overall stability and

predictability of the host country's legal framework for private investment in infrastructure, the model legislative provisions should acknowledge the efforts that had been made in many countries, including developing countries, to improve their investment climate. The Working Group took those views into account and requested the Secretariat to draft a model legislative provision reflecting the substance of recommendation 41.

## **Organization of the concessionaire**

122. The text of the relevant recommendations was as follows:

### *Recommendation 42*

"The contracting authority should have the option to require that the selected bidders establish an independent legal entity with a seat in the country."

### *Recommendation 43*

"The project agreement should specify the minimum capital of the project company and the procedures for obtaining the approval by the contracting authority of the statutes and by-laws of the project company and fundamental changes therein."

123. It was observed that on some occasions the requirement of a minimum capital was established by the contracting authority as a prerequisite for entering into the agreement. The suggestion was made that, in view of the relationship between recommendations 42 and 43 and the governing law of the project agreement, those recommendations were suitable for transformation into model legislative provisions.

## **The project site, assets and easements**

### *Recommendation 44*

124. The text of the recommendation was as follows:

"The project agreement should specify, as appropriate, which assets will be public property and which assets will be the private property of the concessionaire. The project agreement should identify which assets the concessionaire is

required to transfer to the contracting authority or to a new concessionaire upon expiry or termination of the project agreement; which assets the contracting authority, at its option, may purchase from the concessionaire; and which assets the concessionaire may freely remove or dispose of upon expiry or termination of the project agreement."

125. It was suggested that the distinction made in recommendation 44 between various categories of project assets reflected well-established principles of law in some legal systems. Therefore, the recommendation was found to be suitable for transformation into a model legislative provision.

### *Recommendation 45*

126. The text of the recommendation was as follows:

"The contracting authority should assist the concessionaire in obtaining such rights related to the project site as necessary for the operation, construction and maintenance of the facility. The law might empower the concessionaire to enter upon, transit through, do work or fix installations upon property of third parties, as required for the construction, operation and maintenance of the facility."

127. Strong support was expressed for the view that the issues addressed in recommendation 45 needed to be reflected in model legislative provisions, since they addressed rights and obligations of third parties.

## **Financial arrangements**

128. The text of the relevant recommendations was as follows:

### *Recommendation 46*

"The law should enable the concessionaire to collect tariffs or user fees for the use of the facility or the services it provides. The project agreement should provide for methods and formulas for the adjustment of those tariffs or user fees."

*Recommendation 47*

"Where the tariffs or fees charged by the concessionaire are subject to external control by a regulatory body, the law should set forth the mechanisms for periodic and extraordinary revisions of the tariff adjustment formulas."

*Recommendation 48*

"The contracting authority should have the power, where appropriate, to agree to make direct payments to the concessionaire as a substitute for, or in addition to, service charges to be paid by the users or to enter into commitments for the purchase of fixed quantities of goods or services."

129. The view was expressed that model legislative provisions in respect of recommendations 46-48 should be drafted, since the issue of both collection of fees and other payments to be made to the concessionaire was crucial in respect of the financial balance of the project and the very notion of concession agreement and therefore needed to be addressed at a legislative rather than at a contractual level. After considering that suggestion, the Working Group decided that a model legislative provision dealing with financial arrangements should be limited to stating the right of the concessionaire to collect tariffs or fees for the use of the facility, as mentioned in the first sentence of recommendation 46.

**Security interests***Recommendation 49*

130. The text of the recommendation was as follows:

"The concessionaire should be responsible for raising the funds required to construct and operate the infrastructure facility and, for that purpose, should have the right to secure any financing required for the project with a security interest in any of its property, with a pledge of shares of the project company, with a pledge of the proceeds and receivables arising out of the concession, or with other suitable security, without prejudice to any rule of law that might prohibit the creation of security interests in public property."

131. The Working Group acknowledged that the ability of the concessionaire to grant all those securities which might be required in order to obtain adequate financing (including, when appropriate, securities on the shares of the project company or on the proceeds and the revenues of the concession) was often crucial for the success of the project. While there was consensus as to the importance of the issue, it was also recalled that the issue had proved to be particularly sensible, owing to the constraints provided in some legal systems in respect of the creation of securities or other liens on public property. It was also pointed out that the creation of security rights was a matter exceeding the scope of the concession law and dealt with by the general law on security interests.

132. While the Working Group was aware of the possible difficulty of drafting a model legislative provision that dealt with the various issues related to security interests in an adequate fashion, it was felt that a model legislative provision in that respect would be desirable.

**Assignment of the concession***Recommendation 50*

133. The text of the recommendation was as follows:

"The concession should not be assigned to third parties without the consent of the contracting authority. The project agreement should set forth the conditions under which the contracting authority might give its consent to an assignment of the concession, including the acceptance by the new concessionaire of all obligations under the project agreement and evidence of the new concessionaire's technical and financial capability as necessary for providing the service."

134. It was pointed out that recommendation 50 reflected the importance attached by some legal systems to the personal character (*intuitu personae*) of concession contracts, which was found to be crucial for ensuring the long-term sustainability of the project. Accordingly, the Working Group agreed that the essential principles reflected in the recommendation deserved to be addressed in the form of a model legislative provision.

## **Transfer of controlling interest in the project company**

### *Recommendation 51*

135. The text of the recommendation was as follows:

"The transfer of a controlling interest in a concessionaire company may require the consent of the contracting authority, unless otherwise provided."

136. It was suggested that recommendation 51, like recommendation 50, was crucial in order to preserve the personal character of the project agreement and that, accordingly, its content should be reflected in a model legislative provision.

## **Construction works**

### *Recommendation 52*

137. The text of the recommendation was as follows:

"The project agreement should set forth the procedures for the review and approval of construction plans and specifications by the contracting authority, the contracting authority's right to monitor the construction of, or improvements to, the infrastructure facility, the conditions under which the contracting authority may order variations in respect of construction specifications and the procedures for testing and final inspection, approval and acceptance of the facility, its equipment and appurtenances."

138. The Working Group shared the view that the recommendation dealt with matters of an essentially contractual nature and that no model legislative provision addressing them was desirable.

## **Operation of infrastructure**

### *Recommendation 53*

139. The text of the recommendation was as follows:

"The project agreement should set forth, as appropriate, the extent of the concessionaire's obligations to ensure:

"(a) The adaptation of the service so as to meet the actual demand for the service;

"(b) The continuity of the service;

"(c) The availability of the service under essentially the same conditions to all users;

"(d) The non-discriminatory access, as appropriate, of other service providers to any public infrastructure network operated by the concessionaire."

140. It was suggested that the recommendation reflected fundamental principles of law governing the obligations of infrastructure concessionaires in some legal systems and that, therefore, it would be useful to transform it into a model legislative provision.

### *Recommendation 54*

141. The text of the recommendation was as follows:

"The project agreement should set forth:

"(a) The extent of the concessionaire's obligation to provide the contracting authority or a regulatory body, as appropriate, with reports and other information on its operations;

"(b) The procedures for monitoring the concessionaire's performance and for taking such reasonable actions as the contracting authority or a regulatory body may find appropriate, to ensure that the infrastructure facility is properly operated and the services are provided in accordance with the applicable legal and contractual requirements."

142. The Working Group shared the view that the recommendation dealt with matters of an essentially contractual nature and that no model legislative provision addressing them was desirable.

### *Recommendation 55*

143. The text of the recommendation was as follows:

"The concessionaire should have the right to issue and enforce rules governing the use of the facility, subject to the approval of the contracting authority or a regulatory body."

144. The Working Group did not find it desirable or necessary to formulate a draft model legislative provision on the basis of recommendation 55.

## General contractual arrangements

145. The text of the relevant recommendations was as follows:

### *Recommendation 56*

"The contracting authority may reserve the right to review and approve major contracts to be entered into by the concessionaire, in particular contracts with the concessionaire's own shareholders or related persons. The contracting authority's approval should not normally be withheld except where the contracts contain provisions inconsistent with the project agreement or manifestly contrary to the public interest or to mandatory rules of a public law nature."

### *Recommendation 57*

"The concessionaire and its lenders, insurers and other contracting partners should be free to choose the applicable law to govern their contractual relations, except where such a choice would violate the host country's public policy."

146. The Working Group was of the view that recommendations 56 and 57 dealt with matters of an essentially contractual nature and that no model legislative provision addressing them was desirable.

### *Recommendation 58*

147. The text of the recommendation was as follows:

"The project agreement should set forth:

"(a) The forms, duration and amounts of the guarantees of performance that the concessionaire may be required to provide in connection with the construction and the operation of the facility;

"(b) The insurance policies that the concessionaire may be required to maintain;

"(c) The compensation to which the concessionaire may be entitled following the occurrence of legislative changes or other changes in the economic or financial conditions that render the performance of the obligation substantially more onerous than originally foreseen. The project agreement should further provide

mechanisms for revising the terms of the project agreement following the occurrence of any such changes;

"(d) The extent to which either party may be exempt from liability for failure or delay in complying with any obligation under the project agreement owing to circumstances beyond the reasonable control;

"(e) Remedies available to the contracting authority and the concessionaire in the event of default by the other party."

148. It was suggested that subparagraph (c) reflected fundamental principles of law on infrastructure operation in some legal systems and that, therefore, it was useful to translate it into a model legislative provision. As to the other subparagraphs of the recommendation, however, the Working Group thought that they dealt with matters of an essentially contractual nature and that no model legislative provision addressing them was desirable.

### *Recommendation 59*

149. The text of the recommendation was as follows:

"The project agreement should set forth the circumstances under which the contracting authority may temporarily take over the operation of the facility for the purpose of ensuring the effective and uninterrupted delivery of the service in the event of serious failure by the concessionaire to perform its obligations."

150. It was suggested that the recommendation reflected fundamental principles of law on infrastructure operation in some legal systems and that, therefore, it would be useful to transform it into a model legislative provision.

### *Recommendation 60*

151. The text of the recommendation was as follows:

"The contracting authority should be authorized to enter into agreements with the lenders providing for the appointment, with the consent of the contracting authority, of a new concessionaire to perform under the existing project agreement if the concessionaire seriously fails to deliver the service required or if other

specified events occur that could justify the termination of the project agreement."

152. It was suggested that the recommendation contained useful advice in order to facilitate the financing of infrastructure projects and that, therefore, it would be useful to transform it into a model legislative provision.

## ***Chapter V. Duration, extension and termination of the project agreement***

### **Duration and extension of the project agreement**

#### *Recommendation 61*

153. The text of the recommendation was as follows:

"The duration of the concession should be specified in the project agreement."

154. The Working Group was of the view that it would be useful to draft a model legislative provision to implement recommendation 61.

#### *Recommendation 62*

155. The text of the recommendation was as follows:

"The term of the concession should not be extended, except for those circumstances specified in the law, such as:

"(a) Completion delay or interruption of operation due to the occurrence of circumstances beyond either party's reasonable control;

"(b) Project suspension brought about by acts of the contracting authority or other public authorities;

"(c) To allow the concessionaire to recover additional costs arising from requirements of the contracting authority not originally foreseen in the project agreement that the concessionaire would not be able to recover during the normal term of the project agreement."

156. The Working Group was of the view that the recommendation set out an important principle to ensure transparency and avoid abuse in the extension

of project agreements and that it was therefore suitable for translation into a model legislative provision.

### **Termination of the project agreement**

157. The text of the relevant recommendations was as follows:

#### **Termination by the contracting authority**

##### *Recommendation 63*

"The contracting authority should have the right to terminate the project agreement:

"(a) In the event that it can no longer be reasonably expected that the concessionaire will be able or willing to perform its obligations, owing to insolvency, serious breach or otherwise;

"(b) For reasons of public interest, subject to payment of compensation to the concessionaire."

#### **Termination by the concessionaire**

##### *Recommendation 64*

"The concessionaire should have the right to terminate the project agreement under exceptional circumstances specified in the law, such as:

"(a) In the event of serious breach by the contracting authority or other public authority of their obligations under the project agreement;

"(b) In the event that the concessionaire's performance is rendered substantially more onerous as a result of variation orders or other acts of the contracting authority, unforeseen changes in conditions or acts of other public authorities and that the parties have failed to agree on an appropriate revision of the project agreement."

#### **Termination by either party**

##### *Recommendation 65*

"Either party should have the right to terminate the project agreement in the event that the performance of its obligations is rendered

impossible by the occurrence of circumstances beyond either party's reasonable control. The parties should also have the right to terminate the project agreement by mutual consent."

158. The Working Group was of the view that it would be useful to formulate model legislative provisions to implement recommendations 63-65.

## **Consequences of expiry or termination of the project agreement**

### **Transfer of assets to the contracting authority or to a new concessionaire**

#### *Recommendation 66*

159. The text of the recommendation was as follows:

"The project agreement should lay down the criteria for establishing, as appropriate, the compensation to which the concessionaire may be entitled in respect of assets transferred to the contracting authority or to a new concessionaire or purchased by the contracting authority upon expiry or termination of the project agreement."

160. The Working Group was of the view that the recommendation dealt with matters of an essentially contractual nature and that no model legislative provision addressing them was desirable.

### **Financial arrangements upon termination**

#### *Recommendation 67*

161. The text of the recommendation was as follows:

"The project agreement should stipulate how compensation due to either party in the event of termination of the project agreement is to be calculated, providing, where appropriate, for compensation for the fair value of works performed under the project agreement, and for losses, including lost profits."

162. It was suggested that the recommendation contained useful advice in order to facilitate the financing of infrastructure projects and that, therefore, it could be usefully translated into a model legislative provision. In drafting a model provision, it was said, the Working Group should consider the relationship

between recommendation 67 and recommendation 58, subparagraph (c).

### **Wind-up and transitional measures**

#### *Recommendation 68*

163. The text of the recommendation was as follows:

"The project agreement should set out, as appropriate, the rights and obligations of the parties with respect to:

"(a) The transfer of technology required for the operation of the facility;

"(b) The training of the contracting authority's personnel or of a successor concessionaire in the operation and maintenance of the facility;

"(c) The provision, by the concessionaire, of operation and maintenance services and the supply of spare parts, if required, for a reasonable period after the transfer of the facility to the contracting authority or to a successor concessionaire."

164. It was suggested that recommendation 68 dealt with important follow-up measures that were of particular significance for developing countries and that, therefore, it was desirable to formulate a model legislative provision to address them.

## **Chapter VI. Settlement of disputes**

### **Disputes between the contracting authority and the concessionaire**

#### *Recommendation 69*

165. The text of the recommendation was as follows:

"The contracting authority should be free to agree to dispute settlement mechanisms regarded by the parties as best suited to the needs of the project."

166. It was generally felt that the principle expressed in recommendation 69, providing the contracting authority with the freedom to agree upon those mechanisms for settling of disputes which the parties deemed to be appropriate to the specific needs of the project (including without limitation arbitration),

should be reflected in model legislative provisions. It was pointed out that a legislative sanction of that freedom would provide useful guidance not only to the benefit of countries where explicit prohibitions were in place (possibly deriving from the subject matter of the dispute or from the public nature of the contracting authority), but also for those legal systems where no clear enabling provision was available and the implementation of contractual mechanisms of settlement of disputes might be resisted by judiciary or administrative courts. Accordingly, the Secretariat was requested to draft a model provision reflecting the substance of legislative recommendation 69.

167. In that connection, it was suggested that different mechanisms of settlement of disputes might be required in respect of each phase of an infrastructure project. It was clarified that mechanisms that might be suitable in respect of the bidding phase, where the parties had not yet entered into an agreement, might not be appropriate in respect of disputes arising subsequent to the award and the entering into of the project agreement. Similarly, specific mechanisms might be required for the various subsequent phases of development of the project.

168. The prevailing view, however, was that it was not desirable to insert such distinctions in the model legislative provision reflecting the substance of recommendation 69. In that connection, it was clarified that that recommendation was meant to be of a general nature and did not purport to suggest any specific method of resolution of disputes.

169. A query was raised as to the relationship between recommendation 69 and recommendation 10, providing for the right of the concessionaire to request a review of regulatory decisions by an independent and impartial body. In response, it was recalled that recommendation 10 envisaged primarily situations where the law provided that complaints by public service providers should be filed with an entity other than the contracting authority, such as a regulatory agency or another governmental agency, while recommendation 69 merely covered disputes arising between the concessionaire and the contracting authority.

170. While recognizing the importance of drawing the attention of the host country's legislators to the need for providing dispute settlement mechanisms for dealing with the situations envisaged in

recommendation 10, the Working Group agreed that an attempt to draft model legislative provisions to implement recommendation 10 might prove difficult, in view of the variety of mechanisms that might need to be considered. The Working Group therefore decided that no such model provision was desirable. Nevertheless, an appropriate reference, possibly in a note accompanying the model legislative provisions, should highlight the importance of procedures of review of regulatory decisions to ensure the objective of transparency set forth in the recommendation.

### **Disputes between the project promoters and between the concessionaire and its lenders, contractors and suppliers**

#### *Recommendation 70*

171. The text of the recommendation was as follows:

"The concessionaire and the project promoters should be free to choose the appropriate mechanisms for settling commercial disputes among the project promoters, or disputes between the concessionaire and its lenders, contractors, suppliers and other business partners."

172. It was observed that recommendation 70 usefully spelled out a specific aspect of the general principle of freedom of contract set forth in recommendation 57. Accordingly, it was agreed that it would be useful to draft a model legislative provision reflecting the recommendation, for the purpose of either eliminating existing legal obstacles or to overcoming possible contrary practices of judicial or administrative authorities.

### **Disputes involving customers or users of the infrastructure facility**

#### *Recommendation 71*

173. The text of the recommendation was as follows:

"The concessionaire may be required to make available simplified and efficient mechanisms for handling claims submitted by its customers or users of the infrastructure facility."

174. It was pointed out that recommendation 71 was not concerned with major disputes between the concessionaire and its customers or users of the infrastructure facility, but with claims or disagreements that had not yet reached that stage. Given the variety of mechanisms that might be established to implement the recommendation and the practical rather than legislative character of the matter, the Working Group agreed that no model legislative provision reflecting the substance of the recommendation was desirable.

### **C. Relationship between the draft model legislative provisions and the Legislative Guide**

175. Having completed its review of the legislative recommendations contained in the Legislative Guide, the Working Group proceeded to consider the relationship between the model legislative provisions and the Legislative Guide.

176. As a general comment, it was noted that the model legislative provisions, in accordance with the mandate given to the Working Group by the Commission, were expected to become an addition to the Legislative Guide, but that such model provisions were not expected to supplant the recommendations contained in the Guide.

177. It was pointed out, in that connection, that the need for legislators to bear in mind the whole of the contents of the Legislative Guide, whether or not expressly dealt with in the model legislative provisions, should be clearly spelled out, possibly in the preamble or in explanatory notes thereto. As a general view, it was reaffirmed that the Legislative Guide should be preserved as a valuable piece of work and that, accordingly, the model legislative provisions should be thought of as a product aimed at supplementing rather than replacing it. As to the technique to be used in order to achieve that result, several suggestions were made, including establishing a link between the two texts by way of inserting footnotes or cross references to the relevant chapters of the Guide, or drafting a foreword along the lines of the foreword highlighting the relationship between the recommendations and the notes in the Guide.

178. A further proposal was to reproduce the text of the relevant legislative recommendations next to the text of each model legislative provision. While that suggestion attracted some support, concern was expressed that it might prove misleading as to the respective nature and hierarchy of the provisions, especially where only slight differences in language were given. A further concern was that such a technique might result in diminishing the visibility and ultimately the usefulness of the model legislative provisions.

179. After discussion, it was widely felt that a final decision in that respect would be premature. Accordingly, the Working Group decided that it would be advisable to revert to it at a later stage, while bearing in mind all those different suggestions.

180. There was a specific discussion in respect of the relationship between the model legislative provisions on the selection of the concessionaire and the UNCITRAL Model Procurement Law. In that connection, it was suggested (a) that the preamble or the explanatory notes to the model legislative provisions make clear that the selection proceeding was different from tendering, and (b) that there might be more detailed references in footnotes or otherwise to specific provisions of the UNCITRAL Model Procurement Law.

#### *Notes*

<sup>1</sup> See *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17 (A/56/17)*, para. 369.

<sup>2</sup> Subject to approval by the Commission at its thirty-fifth session.

<sup>3</sup> See *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 17 (A/55/17)*, paras. 195-368.

<sup>4</sup> *Ibid.*, para. 375.

<sup>5</sup> *Ibid.*, para. 379.

<sup>6</sup> *Ibid.*, *Fifty-sixth Session, Supplement No. 17 (A/56/17)*, para. 369.

<sup>7</sup> *Ibid.*, *Fifty-third Session, Supplement No. 17 (A/53/17)*, para. 168.